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In the Supreme Court of the United States

OCTOBER TERM, 1985

LEE M. THOMAS, ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY,
AND THE UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, PETITIONERS

v.

OUTBOARD MARINE CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether Section 104 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9604, which authorizes the Environmental Protection Agency to take removal and remedial action when there is a release or substantial threat of release of a hazardous substance, provides the right to enter private property to design and implement the appropriate removal or remedy.

PARTIES TO THE PROCEEDING

The petitioners are Lee M. Thomas, Administrator of the Environmental Protection Agency, and the Environmental Protection Agency. The respondent is Outboard Marine Corporation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Reasons for granting the petition	7
Conclusion	18
Appendix A	1a
Appendix B	16a
Appendix C	36a
Appendix D	37a
Appendix E	38a

TABLE OF AUTHORITIES

Cases:

Allis-Chalmers Mfg. Co. v. *Gulf & Western Industries, Inc.*, 527 F.2d 335, cert. denied, 423 U.S. 1078	9
Blackie's House of Beef, Inc. v. *Castillo*, 659 F.2d 1211, cert. denied, 455 U.S. 940	15
Chapman v. *Houston Welfare Rights Organization*, 441 U.S. 600	9
Clark v. *Uebersee Finanz-Korp.*, 332 U.S. 480	9
Dalia v. *United States*, 441 U.S. 238	15-16
Lovgren v. *John V. Byrne*, No. 85-5180 (3d Cir. Mar. 26, 1986)	15
International Nutrition, Inc. v. *United States Dep't of Health and Human Services*, 676 F.2d 338	9
Nardone v. *United States*, 308 U.S. 338	16
Regional Rail Reorganization Act Cases, 419 U.S. 102	14
Ruckelshaus v. *Monsanto Co.*, 467 U.S. 986	14

Cases—Continued: Page

Staten Island Rapid Transit Operating Authority v. *ICC*, 718 F.2d 533 9
United States v. *Euge*, 444 U.S. 707 15
United States v. *Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100 11
United States v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985) 14
United States v. *Waste Industries, Inc.*, 734 F.2d 159 11
Weinberger v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609 9

Statutes and regulations:

Comprehensive Environmental Response, Compensation & Liability Act, 42 U.S.C. 9601 (& Supp. II) *et seq.*:
§ 101(23), 42 U.S.C. 9601(23) 6, 38a
§ 101(24), 42 U.S.C. 9601(24) 6, 12
§ 101(25), 42 U.S.C. 9601(25) 12, 39a
§ 104, 42 U.S.C. 9604 ..... 5, 6, 8, 10, 11, 12, 16
§ 104(a), 42 U.S.C. 9604(a) 3, 5, 6, 7, 12, 13, 14, 15, 16, 39a
§ 104(a)(1), 42 U.S.C. 9604(a)(1) 10, 11
§ 104(b), 42 U.S.C. 9604(b) 5, 6, 7, 8, 13, 14, 15, 16, 40a
§ 104(c)(3), 42 U.S.C. 9604(c)(3) 12
§ 104(e), 42 U.S.C. 9604(e) 5, 14, 15
§ 104(e)(1), 42 U.S.C. 9604(e)(1) 5, 40a
§ 104(e)(2), 42 U.S.C. 9604(e)(2) 5
§ 104(e)(3)(D), 42 U.S.C. 9604(e)(3)(D) . 17
§ 105(8), 42 U.S.C. 9605(8) 3
§ 106(a), 42 U.S.C. 9606(a) 3, 41a
§ 107, 42 U.S.C. 9607 ..... 4, 9
§ 107(a), 42 U.S.C. 9607(a) 3

Statutes and regulations – Continued	Page
§ 221(a), 42 U.S.C. 9631(a)	10
§ 221(b), 42 U.S.C. 9631(b)	10
Clean Water Act, 33 U.S.C. 1251 *et seq.*	3
Fishery Conservation and Management Act of 1976, 16 U.S.C. 1801 *et seq.*	15
Refuse Act of 1899, 33 U.S.C. 407	3
Resources Conservation and Recovery Act of 1976, § 3007, 42 U.S.C. 6927	15
Toxic Substances Control Act, 15 U.S.C. (& Supp. II) 2601 *et seq.*	2
Tucker Act, 28 U.S.C. 1491	14
18 U.S.C. 2518	16
40 C.F.R.:	
Pt. 300, App. B	3
Pt. 761	2
Miscellaneous:	
126 Cong. Rec. 31964 (1980)	9
131 Cong. Rec.:	
p. H11619 (daily ed. Dec. 10, 1985)	17
p. H11622 (daily ed. Dec. 10, 1985)	17
p. S12184 (daily ed. Sept. 26, 1985)	16
p. S12189 (daily ed. Sept. 26, 1985)	16
49 Fed. Reg. 40320 (Oct. 15, 1984)	8
50 Fed. Reg. (1985):	
p. 14115	8
p. 37950	8
S. 1480, 96th Cong., 2d Sess. (1980)	10
H.R. 2005, 99th Cong., 1st Sess. (1985)	16
H.R. 7020, 96th Cong., 2d Sess. (1980)	10
S. Rep. 96-848, 96th Cong., 2d Sess. (1980)	10
S. Rep. 99-11, 99th Cong., 1st Sess. (1985)	16
J. Sutherland, *Statutory Construction* (4th 1974)	9

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v.

OUTBOARD MARINE CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Administrator of the Environmental Protection Agency and the Environmental Protection Agency (EPA), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 773 F.2d 883. The opinion of the district court (App., *infra*, 16a-35a) is reported at 610 F. Supp. 1234.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 36a) was entered on September 23, 1985. A petition for rehearing was denied on November 25, 1985 (App., *infra*, 37a). On February 13, 1986, Justice Stevens extended the time

for filing a petition for a writ of certiorari to and including April 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

At issue in this case is whether Section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C 9604, which authorizes EPA to conduct hazardous waste cleanup actions, provides the authority to enter private property when necessary to design and implement a cleanup action. The court of appeals held that Section 104 provides no such authority (App., *infra*, 13a-15a).

1. This case arises from EPA's efforts to remedy polychlorinated biphenyl (PCB) contamination on, and adjacent to, property owned by the Outboard Marine Corporation (OMC) at Waukegan Harbor, Illinois. OMC owns an industrial complex on property beside the Harbor, where it conducts manufacturing operations and has its corporate headquarters (App., *infra*, 2a, 17a). EPA contends that OMC is responsible for PCB contamination in a drainage ditch at the northern end of OMC's property, on approximately one third of OMC's north parking lot, and on other portions of OMC's property.[1] In addition, EPA contends that OMC released PCBs into Upper Waukegan Harbor (App., *infra*, 17a). EPA estimates that the site contains approximately 1.1 million pounds of PCBs.[2] This

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[1] A map of the site is found at App., *infra*, 15aa.

[2] Sediment samples at the site have been found to contain PCBs at concentrations ranging up to 500,000 parts per million. Current regulations issued pursuant to the Toxic Substances Control Act, 15 U.S.C. (& Supp. II) 2601 *et seq.*, require special handling and controlled disposal of materials contaminated with PCBs at concentrations of 50 parts per million or higher. 40 C.F.R. Pt. 761.

site is ranked 82d of 541 sites on the National Priority List of hazardous waste sites requiring cleanup action, and ranked as the number one priority site by the State of Illinois (App., *infra*, 1a).[3]

The United States initially sought to require OMC to remedy the contamination at this site. Suit was filed in March 1978, seeking mandatory injunctive relief under the Refuse Act, 33 U.S.C. 407, and the Clean Water Act, 33 U.S.C. 1251 *et seq.*, and seeking civil penalties under the Clean Water Act. Following the enactment of CERCLA in 1980, the United States on February 2, 1982, added a count for injunctive relief under Section 106(a) of CERCLA (42 U.S.C. 9606(a)), which authorizes the United States to seek such relief as may be necessary to abate the actual or threatened release of a hazardous sustance where there may be "an imminent and substantial endangerment to the public health or welfare or the environment."

In late 1982, rather than continue the protracted litigation seeking to compel OMC to clean up the site, EPA decided to conduct its own remedial cleanup, under the authority of Section 104(a) of CERCLA, retaining the option to sue OMC to recover cleanup costs under Section 107(a) of CERCLA, 42 U.S.C. 9607(a).[4] EPA accordingly conducted proceedings to evaluate remedial action alternatives for the Waukegan Harbor site, and on May 15, 1984, issued a Record of Decision selecting a remedy with

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[3] The National Priority List was compiled pursuant to Section 105(8) of CERCLA, which requires that the ranking reflect the degree of "relative risk or danger to public health or welfare or the environment" (42 U.S.C. 9605(8)). The list appears as Appendix B to the regulations implementing CERCLA (40 C.F.R. Pt. 300).

[4] That Section provides that any person who owns or operates any facility at which hazardous substances are disposed of by EPA or a state shall be liable for "all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan."

an estimated cost of approximately $21 million (App., *infra*, 18a). The remedy requires that sediments with the highest concentration of PCBs be excavated and transported off-site to a licensed waste landfill. The remaining sediments will be excavated and treated over a several-year period in temporary lagoons to be constructed on portions of OMC's "Harbor Front" property which do not require remedial action (*ibid.*). The treated sediments will then be stored permanently in a six acre containment cell to be constructed on a contaminated portion of OMC's north parking lot (App., *infra*, 3a-4a).

The United States on May 21, 1984, moved for voluntary dismissal without prejudice of its injunctive relief action. The district court granted the motion on February 6, 1985, conditioned on EPA's execution of a covenant not to sue under the remaining counts of the dismissed complaint, including the Section 106 CERCLA count (App., *infra*, 2a, 17a). The covenant, executed by EPA on April 23, 1985, expressly reserved the right of the United States to bring a cost recovery action under Section 107 of CERCLA following EPA cleanup (App., *infra*, 17a).[5]

2. In January 1985, EPA attempted to negotiate voluntary access to OMC's property to complete design plans and specifications for its selected remedy. When OMC refused, the United States on February 13, 1985, applied for and obtained a magistrate's ex parte warrant authorizing entry to complete the design phase only—denominated Phase 1—including: (1) a general walk-through of the exterior portions of OMC's property by the design team; (2) a survey to establish control monuments on the property, including placement of short pipe sections at ground level; and (3) a subsurface investigation requiring up to 23 soil borings (App., *infra*,

[5] OMC appealed the final order of dismissal (No. 85-1584 (7th Cir.)) That appeal has been briefed and argued.

3a, 17a-18a, 19a).[6] EPA did not seek, nor did the warrant authorize, access to implement the remedy—denominated Phase 2 (App., *infra*, 19a).

In its warrant application, EPA stated that there had been a release of PCBs into the environment at the Waukegan Harbor site, and that an on site remedial response was necessary to prevent PCB migration (App., *infra*, 5a, 19a). EPA relied on Section 104(a), (b) and (e) of CERCLA as authority to enter and conduct its planned design activities (*ibid.*).[7] The magistrate found that "reasonable grounds exist for an administrative entry pursuant to Section 104 of CERCLA (42 U.S.C. 9604); and for the issuance of an entry warrant" (CR-1, Exh. B, at 1). She accordingly issued the warrant for a period not to exceed 70 days (*id.* at 3).

3. OMC refused to honor the warrant and moved to quash (App., *infra*, 6a). After the magistrate denied the motion, OMC filed a complaint in the United States District Court for the Northern District of Illinois on

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[6] The walk-through would involve up to 16 persons and 7 automobiles; the surveying up to 3 persons and 1 van; and the subsurface investigation up to 17 persons and 16 vehicles, including drilling equipment (App., *infra*, 3a).

[7] Section 104(a) (42 U.S.C. 9604(a)) authorizes the President, through EPA, "to act * * * to remove * * * [any] hazardous substance * * * or take any other response measure" deemed necessary; Section 104(b) (42 U.S.C. 9604(b)) permits him to "undertake such planning * * * engineering * * * and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions." Section 104(e)(1) of CERCLA (42 U.S.C. 9604(e)(1)) authorizes entry "to inspect and obtain samples * * *." Section 104(e)(2) deals with the protection of "records, reports or information obtained from any person under this section" (42 U.S.C. 9604(e)(2)). The district court (App., *infra*, 29a) and the court of appeals (App., *infra*, 11a-12a) both held that Section 104(e) does not authorize entry for the design activities sought in this case. We do not contest that holding in this Court.

April 8, 1985, requesting a preliminary injunction enjoining the United States from executing the warrant, and seeking reversal of the magistrate's order denying the motion to quash the warrant (App., *infra*, 20a).

The district court denied OMC's motions for preliminary injunction and for reversal of the magistrate's action on April 30, 1985 (App., *infra*, 16a-35a). The court held that Section 104(b) of CERCLA authorized access for the specific design actions described by the warrant (App., *infra*, 30a). The court reasoned that "CERCLA's definitions make clear that the activities described [in Section 104(a)] as response, remedial, and removal necessarily include entry on the waste site" (App., *infra*, 22a).[8] The court concluded that: "The scope of response actions coupled with the presumption that waste sites will in many cases be privately owned, therefore, persuades the court that CERCLA allows the EPA entry to a privately-owned site for purposes of investigation and response" (App., *infra*, 30a).

4. On September 23, 1985, the court of appeals reversed and remanded the case for the grant of a preliminary injunction, on the ground that Section 104 of CERCLA (42 U.S.C. 9604) does not authorize entry to

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[8] The court pointed out (App., *infra*, 22a) that the term "remove," for instance, means "the cleanup or removal of released hazardous substances from the environment" (§ 102(23), 42 U.S.C. 9601(23)), which cannot be accomplished without site access, and the term also includes such on site actions as providing "security fencing or other measures to limit access, provision of alternative water supplies, [and] temporary evacuation and housing of threatened individuals not otherwise provided for" (*ibid.*).

The court also noted (App., *infra*, 22a-23a) that the definition of the term "remedy" includes "such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, [and] cleanup of released hazardous substances or contaminated materials" (§ 101(24), 42 U.S.C. 9601(24)).

private property for the requested design actions. The court also held that Phase 1 design cannot be separated from Phase 2 construction, and "EPA cannot clearly show that it will be entitled to enter the property to begin Phase 2" (App., *infra*, 14a-15a).

The court dismissed the authority provided by Section 104(a), the principal response section, as "merely a general grant of power for remedial action to protect the public health, welfare, or the environment" (App., *infra*, 10a). The court also rejected Section 104(b) as a basis for entry authority, virtually without analysis, on the incorrect assumption that "EPA itself has conceded that the source of its authority to enter for actual construction is unclear" (App., *infra*, 11a).[9] Hence, the court found, "[t]hat being so, it is difficult to conclude that Congress implicitly granted, rather than failed to grant intentionally or through oversight, a specific right of entry for response-planning operations" (*ibid.*).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals frustrates EPA's efforts to conduct hazardous waste cleanup actions under CERCLA. Despite the clear authorization by Congress in Section 104 to the Executive "to act * * * to remove * * * and provide for remedial action relating to [a] hazardous substance," and to undertake "investigations * * * as * * * appropriate to plan and direct [such] actions," the court of

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[9] The United States advised the district court and the court of appeals only that subsequent access to implement the remedy would require further judicial process, not that the right to such access is in doubt (see App., *infra*, 19a). The United States contemplated that more elaborate, adversarial proceedings would be appropriate to sanction the long-term, physically significant entry to construct the remedy.

appeals has held that EPA has no authority to enter private property to design and implement an appropriate remedy. The court's decision is directly contrary to the broad remedial purposes of CERCLA, to long-standing principles of statutory interpretation, and to decisions regarding other programs in which reasonable authority to implement a law enforcement mandate has been implied. The immediate effect of the decision is to halt all efforts to clean up PCB contamination at the Waukegan Harbor site. The decision, moreover, is also likely to have a direct and immediate impact on EPA's ability to clean up the other 48 sites on the National Priority List within the Seventh Circuit. 40 C.F.R. Pt. 300, App. B.[10] The decision also casts doubt on EPA's ability to conduct remedial actions at the hundreds of hazardous waste sites located in every other state across the country where there has been a release or there is a substantial threat of release.[11] Thus, the court of appeals decision merits correction by this Court.

1. a. In ruling that Section 104 (42 U.S.C. 9604) provides no right of access to private property to design or implement cleanup actions, the court of appeals has effectively restricted EPA's response authority, an essential part of CERCLA, to the detection of hazardous substances. While the decision apparently permits EPA to gain entry to determine whether there is an actual or threatened release, under authority of Section 104(b) (42 U.S.C. 9604(b)) (App., *infra*, 10a-11a), the agency cannot then remedy the problem absent voluntary cooperation from the property owner. Such cooperation is likely to be withheld, since the owner is typically the responsible party

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[10] An additional 25 sites in the Seventh Circuit have been proposed for inclusion on the List. 49 Fed. Reg. 40320 (1984); 50 Fed. Reg. 14115 (1985); 50 Fed. Reg. 37950 (1985).

[11] Defense counsel in a number of other CERCLA cases have already raised access issues based on the instant decision.

liable for costs of the cleanup under Section 107 (42 U.S.C. 9607), who has refused to conduct the cleanup himself. Nevertheless, in the court of appeals' view, while EPA can "identify the existence, extent, source, and nature of the hazard" (App., *infra*, 10a-11a), EPA must at that point leave the site; it cannot enter to complete design or to clean up the hazard.

In reaching this result, the court failed to observe one of the fundamental tenets of statutory construction, that courts construe an Act of Congress so as to "best serve the intended purposes of the statute." *Allis-Chalmers Mfg. Co.* v. *Gulf & Western Industries, Inc.*, 527 F.2d 335, 348 (7th Cir. 1975), cert. denied, 423 U.S. 1078 (1976). *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979). A court's "task in interpreting separate provisions of a single Act is to give the Act 'the most harmonious, comprehensive meaning possible' in light of the legislative policy and purpose" (*Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-632 (1973) (quoting *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 488 (1947)). In particular, a remedial statute such as CERCLA "should be liberally construed in order to effectuate the remedial purpose for which it was enacted." J. Sutherland, *Statutory Construction* ¶ 60.01, at 29 (4th ed. 1974); *Staten Island Rapid Transit Operating Authority* v. *ICC*, 718 F.2d 533, 541 (2d Cir. 1983); *International Nutrition, Inc.* v. *United States Dep't of Health and Human Services*, 676 F.2d 338, 341 (8th Cir. 1982).[12]

CERCLA's broad remedial mandate is to "get on immediately with the business of cleaning up the thousands of hazardous waste sites which dot this country." 126

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[12] The court below identified no legislative policy or remedial purpose supporting its narrow reading of the statutory language. Instead, it simply concluded that "Congress, possibly through oversight, neglected to provide for a right of entry" (App., *infra*, 11a).

Cong. Rec. 31964 (1980) (remarks of Rep. Florio);[13] S. Rep. 96-848, 96th Cong., 2d Sess. 8 (1980). While Section 104 (42 U.S.C. 9604) does not explicitly grant EPA a right of entry for remedial design or construction, it does authorize EPA to clean up privately-owned hazardous waste sites where there exists an actual or threatened release. Section 221(a) of CERCLA (42 U.S.C. 9631(a), in turn, establishes the Hazardous Substance Response Trust Fund (the Superfund) to finance EPA response actions under Section 104. It is inconceivable that Congress would create response authority, and fund it in the amount of $1.6 billion,[14] without intending that EPA be able to enter private property to undertake remedial action. Congress could not have intended that EPA would be left simply to hope that entry would be permitted by potentially responsible parties who have already refused to undertake appropriate remedial action themselves.[15]

In the court of appeals' view, EPA can obtain access, absent voluntary cooperation, only through the imminent and substantial endangerment provision of Section 106 (42 U.S.C. 9606) if the site presents such an endangerment (App., *infra*, 14a).[16] This is not, however, an adequate

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[13] There is no conference report for CERCLA; the primary sources of CERCLA's legislative history are the floor debates preceding adoption of the final bill by the Senate on November 28, 1980, and by the House on December 3, 1980, and the legislative histories of the original House and Senate bills (H.R. 7020, 96th Cong., 2d Sess., and S. 1480, 96th Cong., 2d Sess., respectively). Because Representative Florio was a sponsor of CERCLA, his remarks during the floor debate are entitled to substantial weight.

[14] See § 221(b), 42 U.S.C. 9631(b).

[15] A predicate of a Section 104 response action is a determination that the owner will not assume that obligation himself. 42 U.S.C. 9604(a)(1).

[16] The court of appeals incorrectly asserted that this case involved no imminent and substantial endangerment (App., *infra*, 4a). This

alternative; nor does it implement congressional intent. First, the standard for taking action under Section 106 is different from that under Section 104; EPA need not show an imminent and substantial endangerment under Section 104. In addition, although authorization of access is certainly part of the relief that a court may grant under Section 106, that Section is primarily intended as a means to compel private parties to conduct the clean-up, rather than to provide access for governmental cleanup efforts. Moreover, the Section 106 process can be cumbersome and lengthy, as demonstrated by the facts of this case. Congress passed Section 104 precisely to provide EPA with an alternative to seeking injunctive relief pursuant to Section 106. But the appellate court's cramped reading of

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issue was not before the court of appeals; the district court expressly refrained from adjudicating any factual issues, as there has been no evidentiary hearing (App., *infra* 16a).

Section 104(a)(1) of CERCLA (42 U.S.C. 9604(a)(1)) authorizes EPA to take response or remedial action whenever there is a release or substantial threat of release of either (A) a hazardous substance, or (B) any pollutant which may present an "imminent and substantial danger to the public health or welfare." EPA's warrant application relied solely on its determination, under Subparagraph A, that there had been a release of a hazardous substance. EPA did not invoke its authority, nor did the magistrate or district court address such authority, under the imminent and substantial endangerment standard of Subparagraph B. App., *infra*, 17a.

Moreover, the court of appeals improperly limited CERCLA's imminent and substantial endangerment provisions to "emergency" situations (App., *infra*, 14a). Nothing in CERCLA, however, confines this standard to "emergencies." To the contrary, a substantial body of caselaw expressly recognizes that an endangerment may be imminent and substantial even though harm may not be realized for years. See, *e.g.*, *United States* v. *Waste Industries, Inc.*, 734 F.2d 159, 165 (4th Cir. 1984); *United States* v. *Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100, 1109-1110 (D. Minn. 1982).

Section 104 has effectively restricted that congressionally provided alternative to the rare instances when voluntary access will be granted, at least with respect to privately owned sites.[17]

Section 104(a) authorizes EPA "to act * * * to remove * * * and provide for remedial action" for hazardous waste. This language alone, by necessary implication, authorizes EPA to enter private property to the extent necessary both to design and to implement the remedial action. EPA cannot fulfill its responsibilities without access, a fact ignored by the court of appeals' quick dismissal of Section 104(a) as "merely a general grant of power for remedial action" (App., *infra*, 10a). Congress's grant of this power is, in fact, the central purpose of Section 104, and the statute must be construed to make this remedial authority effective. Furthermore, as the district court correctly observed (App., *infra*, 22a-23a), CERCLA's definitional sections demonstrate that Congress intended to authorize access. Section 104(a) of CERCLA authorizes an EPA "response." "Response" includes "remedial action" (§ 101(25), 42 U.S.C. 9601(25)), which in turn includes "those actions consistent with permanent remedy taken instead of or in addition to removal action * * * to prevent or minimize the release of hazardous substances so that they do not migrate" (§ 101(24), 42 U.S.C. 9601(24)).[18] The term specifically *excludes* "offsite

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[17] Section 104 was evidently intended to apply to both private and public sites; it does not contain the distinction Congress explicitly drew between them where deemed warranted elsewhere in CERCLA. See Section 104(c)(3) (42 U.S.C. 9604(c)(3)) providing 90 percent EPA funding for cleanup of private sites, but 50 percent funding for state-owned sites.

[18] The district court also noted (App., *infra*, 22a-23a) that the statutory definition of "remedy" includes such necessarily on-site actions as "storage, confinement, * * * clay cover, neutralization, [and] cleanup of released hazardous substances or contaminated materials" (§ 101(24), 42 U.S.C. 9601(24)).

transport [or storage, or treatment] of hazardous substances" unless EPA determines that off-site actions are the most cost-effective (*ibid.*). Thus, CERCLA's definitions clearly contemplate on-site response actions under Section 104(a).[19]

Section 104(b) further provides that whenever EPA is authorized to conduct a response action, it may undertake "planning, * * * engineering, architectural, and other studies or investigations as [it] may deem necessary or appropriate to plan and direct response actions." CERCLA's definitions of "response" and "remedial" again demonstrate congressional intent that such actions, where necessary are to be conducted at the site. All of the design work sought in this case pursuant to the warrant consists of "planning" and "engineering" studies or investigations; it thus fits precisely within the activities specifically authorized by Section 104(b).

The court of appeals, without analysis of the language or purpose of Section 104(b), nevertheless refused to apply this Section, based solely on its incorrect conclusion that EPA questioned its own authority to enter for Phase 2 construction. The court declined to infer a right of access

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[19] OMC further contended below that its Waukegan Harbor complex should be viewed as a grouping of separate facilities, some of which are contaminated and some of which are not (App., *infra*, 9a). Under this contention, Section 104(a) of CERCLA would authorize remedial action only at those portions of the overall property which are contaminated, and would not authorize construction of temporary treatment facilities on uncontaminated portions. This argument, however, is flatly contradicted by the broad language of Section 104(a), which authorizes EPA "to act," to "provide for remedial action relating to such hazardous substance * * *." There is no support in CERCLA for subdividing the property into smaller parcels, and restricting EPA's response powers to contaminated portions.

for response planning where it found none for implementation (App., *infra*, 11a).[20] Given Section 104(b)'s contemplation of on-site planning, however, and the fact that design access is critical to an effective response under Section 104(a), the court's holding is erroneous.[21]

b. In other contexts, the courts have not hesitated to engage in statutory construction where reasonably necessary to permit administrative agencies to carry out the tasks assigned to them by statute. For example, in

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[20] In concluding that there was no authority for access for Phase 2, the court of appeals incorrectly found it significant that EPA lacks explicit authority to condemn property. (App., *infra*, 13a). But a government activity that might effect a taking may be enjoined only if the particular activity lacks statutory or constitutional authorization. Here, EPA's response activities are authorized by CERCLA. If a property owner believes the exercise of government authority effects a taking, his proper course is not to seek equitable relief enjoining the alleged taking, but to file a suit for compensation under the Tucker Act, 28 U.S.C. 1491. Accordingly, the issue is not, as the court of appeals believed, whether an express condemnation power exists in the statute, but whether the statute or its legislative history expresses an unambiguous intention to withdraw the Tucker Act remedy for any taking that may occur in the implementation of the statute. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016-1017 (1984); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126 (1974); *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985). Here, CERCLA manifests no intent to withdraw recourse to the Tucker Act.

[21] OMC has also argued that because Section 104(e) explicitly provides a right of entry for the record inspection purposes specified in that Section, the absence of similar language in Section 104(b) demonstrates that Congress intended no right of entry for purposes of that Section. The district court correctly noted, however, that inspection of records can be accomplished without entry, while inspection of physical premises cannot be accomplished without entry. Thus, "there is a legitimate distinction between searches under § 104(b) and (e) justifying the latter subsection's explicit reference to the right of 'entry.' " App., *infra*, 29a-30a.

The district court's analysis similarly explains the absence of an ex-

United States v. *Euge*, 444 U.S. 707, 711 (1980), the Court held that while the tax code did not explicitly authorize the IRS to summon individuals to produce certain types of evidence, such authority "is necessary for the effective exercise of the Service's enforcement responsibilities." The Court concluded (*ibid.*) that "this Court has consistently construed congressional intent to require that if the summons authority claimed is necessary for the effective performance of congressionally imposed responsibilities * * *, that authority should be upheld absent express statutory prohibition or substantial countervailing policies." The court in *Blackie's House of Beef, Inc.* v. *Castillo*, 659 F.2d 1211, 1222 (D.C. Cir. 1981), cert. denied, 455 U.S. 940 (1982), similarly held that the right of the Immigration and Naturalization Service to enter commercial premises with a proper warrant to search out suspected violations of the immigration laws derived from its general statutory power to seek out and question suspected illegal aliens. See also *Lovgren* v. *John V. Byrne*, No. 85-5180 (3d Cir. Mar. 26, 1986), slip op. 11-12 (Fishery Conservation and Management Act of 1976, 16 U.S.C. 1801 *et seq.* authorizing warrantless inspections of vessels, also implicitly authorizes federal warrantless dock inspections; otherwise, "the agency's efforts to gather accurate information would be substantially frustrated."). Cf. *Dalia* v. *United States*, 441 U.S. 238, 249-254 (1979)

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press entry provision in Section 104(a). Congress could not have intended through a single reference to entry for the limited purposes of Section 104(e) to have negated the broader remedial purposes of Section 104(a) and (b), which depend on entry for their implementation. We note in addition that Section 104(e) is an access and inspection provision substantially identical to those contained in other environmental statutes. See, *e.g.*, Section 3007 of the Resources Conservation and Recovery Act of 1976, 42 U.S.C. 6927.

(interpreting 18 U.S.C. 2518 to permit covert entry in order to install bugging devices; "[t]o read the statute otherwise would be to deny the 'respect for the policy of Congress [that] must save us from imputing to it a self-defeating, if not disingenuous purpose' " (421 U.S. at 254, quoting *Nardone* v. *United States,* 308 U.S. 338, 341 (1939)).

The right of entry to private property, consistent with constitutional limitations, is no less necessary to enable EPA to carry out its remedial responsibilities under CERCLA than the powers implied in the above cases were to the implementation of the statutory responsibilities of the agencies there involved. The entire logic of the statute compels the conclusion that such access to conduct design activities is implicitly authorized by both Section 104(a) and (b), and that access to implement EPA's cleanup actions is similarly authorized by Section 104(a).

2. Congress is currently considering funding reauthorization and program amendments to CERCLA which would explicitly confirm that EPA has access authority under Section 104.[22] Final enactment of an ap-

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[22] The Senate passed the Superfund Improvement Act on September 26, 1985, stating that EPA has authority to "enter * * * any * * * place or property * * * [where necessary] to determine * * * the appropriate response or to effectuate a response action under this title." H.R. 200., 99th Cong., 1st Sess. § 120(1)(B); 131 Cong. Rec. S12184, S12189 (daily ed. Sept. 26, 1985). The report accompanying the bill (S. Rep. 99-11, 99th Cong., 1st Sess. 26 (1985) states that:

> The Amendment confirms the broad access authority that Congress originally intended when CERCLA was enacted in 1980. * * * [E]ntry is permissible to determine * * * the appropriate response or to effectuate a response. Thus, government representatives * * * may not only enter sites of known or suspected releases themselves, but may also enter adjacent properties to determine whether a release or threatened release has occurred or to undertake other activities necessary to a response action.

The House passed the Superfund Amendments of 1985 on December

propriate access provision would supersede the court of appeals' decision in this case, making plenary review by this Court unnecessary. While there is congressional agreement as to site access, however, there is substantial controversy between the House and Senate over other provisions, particularly the method and level of funding. The prospects for and timing of final passage of the CERCLA amendments are thus uncertain. We will of course promptly inform the Court of any legislative action that may be taken that will affect this case.

10, 1985, also authorizing entry to determine "the need for response, or choosing or taking any response action under this title." Section 104(e)(1) and (e)(3)(D), 42 U.S.C. 9604(e)(1) and (e)(3)(D). 131 Cong. Rec. H11619, H11622 (daily ed. Dec. 10, 1985). Conferees agreed on an access provision on March 13, 1986, largely adopting the House version.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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APRIL 1986

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 85-1753

OUTBOARD MARINE CORPORATION, PLAINTIFF-APPELLANT,

v.

LEE M. THOMAS, ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, DEFENDANTS-APPELLEES.

Argued June 14, 1985

Decided Sept. 23, 1985

Before BAUER and WOOD, Circuit Judges, and GRANT, Senior District Judge.*

HARLINGTON WOOD, Jr., Circuit Judge.

The United States Environmental Protection Agency ("the EPA") has determined that there are deposits of the notorious chemical polychlorinated biphenyls, commonly known as PCBs, in certain areas of Waukegan Harbor, Illinois and an adjacent industrial complex owned by Outboard Marine Corporation ("OMC"), and that the blame lies with OMC. As a hazardous waste site, this area ranks high on the National Priority List and is the number one priority site in the State of Illinois. Even though the PCBs were discovered almost ten years ago, to date little has

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* The Honorable Robert A. Grant, Senior District Judge from the Northern District of Indiana, is sitting by designation.

been accomplished. This part of the controversy is concerned with the means chosen by the EPA to finally get started with remedial action.

Factual Background

OMC manufactures outboard motors, lawn mowers, and industrial and turf care vehicles at its industrial complex in the Waukegan Harbor area and at other locations in the United States and abroad. In addition to the manufacturing plant, OMC's Waukegan Harbor complex houses its corporate headquarters, central data processing facilities, and engineering operations.[1] Over two thousand people are employed at this site.

In 1976, the EPA announced that there were PCBs in the sediments at the bottom of Slip No. 3 and that OMC's operation was the source. Two years later the EPA brought suit against OMC, alleging that the PCBs in Slip No. 3 and in parts of OMC's North Property constituted a threat to the environment and seeking to compel OMC to remove the hazards. For the next seven years, the parties engaged in discovery which included samplings of OMC's complex and the harbor, and studies of the possible effects of PCBs. The EPA then moved to dismiss its case voluntarily. The district court, over OMC's objection, allowed the motion to dismiss without prejudice, but upon the condition that the EPA agree not to sue OMC except under the cost-recovery provisions of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("the Act"), 42 U.S.C. § 9601 *et seq.*[2]

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[1] An unscaled plot is attached illustrating the OMC complex as designated. To give some idea of scale the portion designated as Harbor Front Property, which is not contaminated but which will be at least in part occupied, is a tract of approximately thirty acres.

[2] OMC appealed the dismissal and that appeal is now pending in this court.

The EPA is now, as permitted under the dismissal, seeking to institute its own remedial action under section 104 of the Act, 42 U.S.C. § 9604, with the opportunity to seek recovery for cleanup costs from the responsible parties under section 107 of the Act, 42 U.S.C. § 9607. In January, 1985, representatives of the EPA and OMC met to discuss EPA access to the OMC complex for design work purposes. In particular, the EPA sought to conduct a "walk-through" of the exterior portions of OMC's property, survey the site, set markers, and collect twenty-three soil borings. The EPA labels these preliminary activities as Phase 1, and claims that access is not presently sought for the purpose of implementing the actual remedy.

To better understand what Phase 1 amounts to, some detailed examination is necessary. The so-called "walk-through" is not a Sunday afternoon stroll. It would involve about sixteen persons and seven automobiles. The surveying would involve about three persons and one van, and the soil borings would involve about seventeen persons and sixteen vehicles. The equipment would include truck-mounted drill rigs, pickup trucks, vans, water trucks, automobiles, a waste hauler, a job trailer and possibly a bulldozer. Approximately 1,000 square feet of the parking lot would be needed to park the equipment. Survey monuments would be left in place to facilitate later construction. This EPA task force prepared to move in on OMC for a maximum of seventy days, a little over two months.

All of this is preliminary to the actual remedial operations which would involve dredging or excavating thousands of cubic yards of sediments from the harbor, north ditch and OMC parking lot, and transporting the material to the OMC Harbor front property for years of treatment in extensive lagoons and other facilities to be constructed by the EPA. Some of the remainder after

treatment would be permanently housed in a fifteen-foot high "containment cell" to be built on and to occupy six acres of the OMC parking lot. It is estimated that the construction of these EPA facilities on OMC property would take three and one-half years. From oral argument it appears that the EPA, itself without the power of eminent domain, is not certain how it will proceed to gain access to accomplish its actual remedial construction. The EPA informed us that Congress is considering an amendment to grant the authority to enter for actual construction which it seems unsure about under the present statute. We need not reach that issue.

Access at this time, however, is sought only to do the necessary surveying, soil testing for weight-bearing, and design specification work in preparation for the actual construction. The EPA does not contend that an emergency exists at OMC. There is no imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance. If there is an emergency, it is almost ten years old.

This background summary brings us to the legal issue of how EPA access for Phase 1 may be obtained, and what recourse OMC may have for the threatened EPA invasion of its private property.

Acquisition of Access by EPA

After negotiations with OMC failed to voluntarily provide EPA the access it wanted for its preconstruction purposes, the EPA applied *ex parte* to a United States magistrate for a warrant for entry and investigation under sections 104(a), 104(b), and 104(e) of the Act, 42 U.S.C.

§ 9604(a),[3] (b),[4] and (e).[5] In the application for the warrant, among other things, the EPA informed the magistrate that PCBs existed at the site and that an on-site remedial response was necessary. The EPA stated it relied on section 104(e)(1) as most germane for its statutory right to enter the site to perform the field work necessary to prepare the design plans and specifications for the anticipated cleanup construction. The application recited the unsuccessful efforts to accomplish an access agreement with OMC.

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[3] Section 104(a) of the Act, 42 U.S.C. § 9604(a)(1), in materia! part provides:

> Whenever (A) any hazardous substance is released . . . into the environment . . . the President [through the EPA] is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance . . . or take any other response measure consistent with the national contingency plan which the President [through the EPA] deems necessary to protect the public health or welfare or the environment. . . .

[4] Section 104(b) of the Act, 42 U.S.C. § 9604(b), in material part provides:

> Whenever the President . . . has reason to believe that a release has occurred or is about to occur . . . he may undertake such investigations, monitoring, surveys, testing, and other information gathering as he may deem necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or to the environment. In addition, the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions. . . .

[5] Section 104(e)(1) of the Act, 42 U.S.C. § 9604(e)(1), provides:

> (1) For purposes of assisting in determining the need for response to a release under this subchapter or enforcing the provisions of this subchapter, any person who stores, treats, or disposes of, or, where necessary to ascertain facts not available at the

On February 13, 1985, the magistrate, finding that grounds existed for an administrative entry, issued the requested warrant for the so-called Phase 1. When the EPA, armed with the warrant, appeared at OMC's door, admission was refused. After the magistrate denied OMC's motion to quash the warrant, OMC filed this suit seeking to enjoin the EPA from executing the warrant and to reverse the ruling of the magistrate denying the motion to quash the warrant. The district court, 610 F.Supp. 1234, denied OMC's motions for reversal of the magistrate's action and for a preliminary injunction, and took under advisement the EPA's motion to dismiss. The district court examined the issues and, reading the statute broadly, reasoned that since warrants have issued for violation-detection

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facility where such hazardous substances are located, who generates, transports, or otherwise handles or has handled, hazardous substances shall, upon request of any officer, employee, or representative of the President, duly designated by the President, or upon request of any duly designated officer, employee, or representative of a State, where appropriate, furnish information relating to such substances and permit such person at all reasonable times to have access to, and to copy all records relating to such substances. For the purposes specified in the preceding sentence, such officers, employees, or representatives are authorized—

(A) to enter at reasonable times any establishment or other place where such hazardous substances are or have been generated, stored, treated, or disposed of, or transported from;

(B) to inspect and obtain samples from any person of any such substance and samples of any containers or labeling for such substances. Each such inspection shall be commenced and completed with reasonable promptness. If the officer, employee, or representative obtains any samples, prior to leaving the premises, he shall give to the owner, operator, or person in charge a receipt describing the same obtained and if requested a portion of each such sample equal in volume of weight to the portion retained. If any analysis is made of such samples, a copy of the result of such analysis shall be furnished promptly to the owner, operator, or person in charge.

searches, which this is not, but which are as intrusive as the planning search at issue here, the use of the same or similar warrant procedure in this instance was a sensible interpretation of an otherwise ambiguous statute. Even so, the district court considered the use of the warrant, referred to as a search warrant, to be at least unusual and without precedent, and so it seems to be.

The EPA reminds us that the denial of a preliminary injunction will be reversed only for an abuse of discretion, *Roland Machinery Co. v. Dresser Industries*, 749 F.2d 380, 390 (7th Cir.1984), and contends there was no such abuse here. The EPA argues that OMC has failed to show any irreparable harm and disparages OMC's efforts to equate the proposed design activities with actual implementation of the cleanup remedy. It is the EPA's position that the alleged irreparable harm is no more than some temporary inconvenience to OMC which the EPA will attempt to minimize. The irreparable harm, the EPA argues, will be to the EPA and the public interest if the injunction is granted.

The EPA further contends that OMC has failed to show any likelihood of success on the merits. This, the EPA argues, is because Phase 1, the design activity, is distinct from Phase 2, the actual construction. The EPA, although not conceding that Phase 1 constitutes an unequivocable taking, recognizes that the district court, for the purposes of OMC's motion, assumed that it constituted a taking triggering the "just compensation" requirement of the Fifth Amendment. To answer that claim, the EPA points out that governmental activity that would effect a taking may be enjoined *only* if the particular activity lacks statutory or constitutional authorization. *See Ruckelshaus v. Monsanto Co.*, ___ U.S., ___, 104 S.Ct. 2862, 2882, 81 L.Ed.2d 815 (1984); *cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 595-96, 72 S.Ct. 863, 889-890,

96 L.Ed. 1153 (1952) (injunction issued because activity unauthorized). It is the EPA's position that the Tucker Act, 28 U.S.C. § 1491, is the appropriate remedy for any authorized taking, and that compensation need not precede the taking, again relying on *Monsanto*, 104 S.Ct. at 2880. Although the EPA does not claim to have explict eminent domain authority, it argues that whether it does or does not is not the test. The EPA explains that the inquiry should be whether the particular statute or its legislative history expresses an unambiguous intention to withdraw the Tucker Act remedy for any taking that may occur in the implementation of the statute. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126, 95 S.Ct. 335, 349, 42 L.Ed.2d 320 (1974); *Monsanto,* 104 S.Ct. at 2882.

OMC, not surprisingly, does not agree with many of the EPA's contentions. In OMC's view, it sought by its application for preliminary relief only to maintain the status quo pending discovery and a hearing on the merits. OMC claims it will be irreparably harmed if the EPA is permitted to enter pursuant to the *ex parte* warrant and take a sizeable tract of its property which itself is not claimed to be contaminated in violation of its rights under the Fourth and Fifth Amendments to the Constitution. OMC relies upon *Schnell* v. *City of Chicago,* 407 F.2d 1084, 1086 (7th Cir.1969), and *Henry* v. *Greenville Airport Comm'n*, 284 F.2d 631, 633 (4th Cir.1960), in support of its argument that irreparable harm necessarily flows from a constitutional violation. OMC disclaims any injury to the public or the EPA from a temporary stay and points to the government's own delay of many years in moving to solve the problem. OMC disputes the view that the EPA can enter its private property for its remedial design purpose which is considered by OMC to be part of the EPA's anticipated construction project.

OMC does argee that in certain circumstances the Tucker Act provides a legal remedy to parties suffering injuries from authorized governmental actions, but argues that the Tucker Act does not determine whether a government agency has substantive authority for its actions. That authority, OMC says, must be found in the legislation under which the agency acts, principles of eminent domain law, and constitutional restraints. By use of the warrant, the EPA, OMC stresses, has the support of the magistrate's contempt powers. OMC concedes that there is no evidence in the Act that Congress intended to withdraw Tucker Act relief, but that, it argues, is because Congress never conceived of the possibility that the EPA would try to take private property for a treatment plant and dump site for wastes from other areas. The Tucker Act, it argues, gives relief only for authorized governmental actions and this proposed EPA entry is totally unauthorized by statute.

It is OMC's position that the Act permits only remedial actions at facilities, 42 U.S.C. § 9604(a), and further that it permits only non-contiguous areas to be designated as a single facility or site, 42 U.S.C. § 9604(d)(4), if they both satisfy the definition of facility. 42 U.S.C. § 9601(9). OMC views its complex as separate sites, some contaminated, some not. Relying upon this statutory background, OMC contends that Congress intended to permit the remedy of environmental hazards only at actual waste sites; Congress did not intend to authorize construction of a large EPA project on private uncontaminated property which is in daily use by the owner. OMC charges that for the first time in this court the EPA refers to its actions as a feasibility study rather than, as originally claimed by the EPA in its warrant application and as found by the district court, a field investigation to design the remedy, take borings, and leave survey monuments for construction.

DISCUSSION

We respect the resolution by the district court of this troubling and novel problem, but we take a different view of the EPA's actions and authority no matter how necessary or well-intentioned. Seeking the linchpin of the issue, we must carefully examine the statute the EPA primarily relies upon for its authority to enter for its specified purposes.

Recognizing as it must its present lack of clear authority to enter the property to begin actual remedial construction, but hoping in the meantime for some congressional relief or for an order of some sort from some court, the EPA has ingeniously separated out a part of the actual construction, calling it Phase 1. That, it appears, is to permit the EPA to get started on the remedial project without its lack of authority being so obvious. The EPA is alone in denying that surveying the site, placing survey monuments, locating utility lines, and taking weight-bearing subsurface test samples of soil are not, as a usual and practical matter, the customary first things to be done at a construction site. They are too construction-related to be labeled a mere walk-through, or to be considered as authorized under the ordinary and preliminary investigative provisions of the statute discussed below. But even if that not be so, the EPA still lacks authority to enter as the warrant adds nothing when the statute provides nothing.

Section 104(a), the principal response section, is merely a general grant of power for remedial action to protect the public health, welfare, or the environment. Section 104(b) provides the authority, when there is reason to believe that a release has or is about to occur, to investigate, monitor, survey, test, and do other necessary information gathering to identify the existence, extent, source, and nature of the

hazard. This part of the statute is not now involved, however, as these purposes have already been accomplished at the OMC site.

In addition, section 104(b) grants the general authority to "undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations" as are deemed necessary or appropriate "to plan and direct response operations." The district court found implicit in section 104(b) a right of entry for the purpose of planning response operations. Finding that the removal and remedial actions that comprise permissible response actions necessarily require access to the waste site, 42 U.S.C. § 9601(23) and (24), and that response-planning investigations also require access to the waste site, the district court in effect concluded that because the EPA needed access to the site to fulfill its responsiblities Congress must have implicitly granted the authority to enter. We respectfully disagree. The EPA itself has conceded that the source of its authority to enter for actual construction is unclear. Congress, possibly through oversight, neglected to provide for a right of entry for this purpose. The EPA believes that it must petition a federal court to exercise its equitable powers to grant a right of entry. That being so, it is difficult to conclude that Congress implicitly granted, rather than failed to grant intentionally or through oversight, a specific right of entry for response-planning operations.

In its application for a warrant, the EPA cited section 104(e)(1) as most germane for its warrant purposes and set forth what in its view constituted the material parts of the section:

> For purposes of assisting in determining the need for responses to a release under this subchapter or enforcing the provisions of this subchapter, . . . such [EPA] officers, employees, or representatives are authorized

> (A) to enter at reasonable times any establishment or other place where such hazardous substances are or have been generated, stored, treated, or disposed of, or transported from;
>
> (B) to inspect and obtain samples from any person of any such substance. . .

The EPA's selective quoting of that section better suits its purposes than does the full statute, but even the EPA version is only of limited help as the need for a response has already been determined. The language for the "purpose[] of . . . enforcing the provisions" of the subchapter also adds nothing specific. What the EPA omitted in its warrant application from that section plainly limits its authority to enter, whatever its broad language, to the "purposes specified in the preceding sentence." The preceding sentence refers to the necessity that any person who has had some involvement with the hazardous substance furnish information relating to such substance and permit EPA access to any records pertaining to the substance. A reading of the full section set forth in footnote 3 puts the authority in context, and deflates the EPA's selective and expanded reading of the section. It is germane to the application, as the EPA asserts, not for what the section says, but for what the section does not say. The power to enter at reasonable times is not given to begin any response construction, or even for design and surveying purposes, if we assume they are to be separated. The authority to enter to inspect and obtain samples, gather information, and inspect records is limited to the hazardous substance itself; the section does not provide authority for taking subsurface samples to determine what construction can be supported or for the other things the EPA seeks to accomplish as preliminiary to construction.[6]

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[6] We further note that the authority to enter is limited to establishments or other places where the hazardous materials have

On those three sections the EPA rests its authority to have a warrant issued for its right of entry for extended design purposes on tracts of private ground which are not themselves alleged to be a part of the hazard. Putting aside whether leaving survey markers in place after this "walkthrough" has any bearing on whether a taking has occurred, it appears that what the EPA actually seeks is what in the usual context would be construed as a temporary easement to enter and cross over private ground for its particular purposes. An easement ordinarily is a property right not necessarily available upon demand but may require condemnation. In highway improvement matters, for instance, where the government may seek to eliminate a dangerous curve, a temporary detour over private property, if not voluntarily given, can only be acquired by condemnation. The "quick take" variety permits the condemnor to secure the use of the property immediately upon payment into court of the appraised value, with the final damage amount to be determined later at trial. That may be what EPA needs and does not have. Only Congress, not we, can supply that power.

But, EPA argues, never mind, we have an open ended right to enter where we please to fulfill any of our obligations to the public and the bill should be sent by the private owner not to us but to the government in care of the Tucker Act. Then if we were authorized to enter as we claim, says the EPA, and if in fact what we did actually amounted to a taking, then you, the owner, may recover any damages incurred. Otherwise, thank you very much for the several months' use of your land.

Regardless of the noble purposes of the EPA, at least in nonemergency situations, that procedural approach strains our usual constitutional concepts. In our view, the

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been generated, stored, treated, disposed of or transported from. It is at least questionable whether the uncontaminated tracts at issue here fit into those permissible categories.

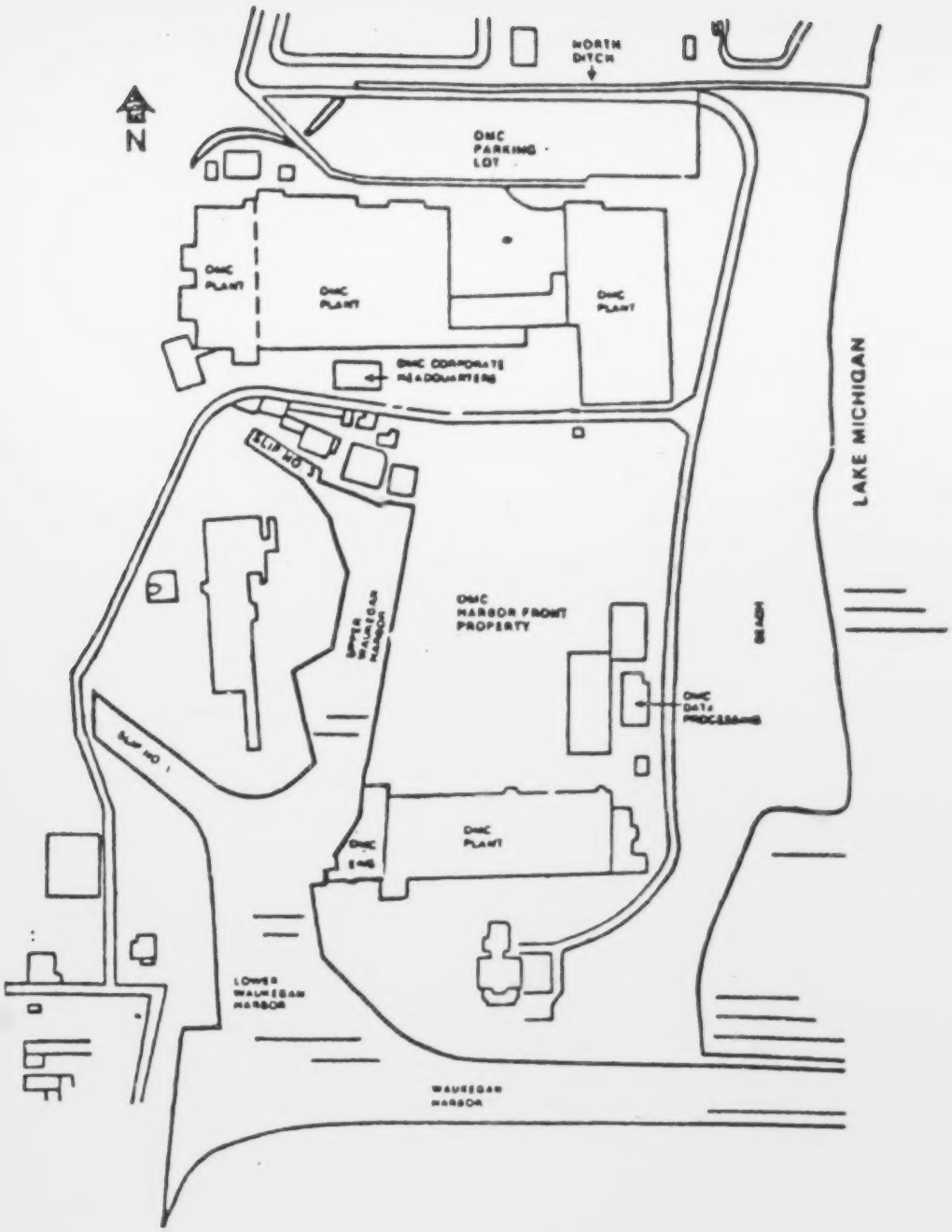
sections relied upon by the EPA do not give it the authority to do that which it seeks to do and which the magistrate and the district judge permitted. The statute is not as ambiguous as it is lacking. We cannot, out of a zeal to rid our environment of its hazards, rewrite the statute for the EPA. Congress is very capable of doing that. That congressional capability is demonstrated by this very statute. Under section 106, 42 U.S.C. § 9606, when the EPA determines "that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, [the EPA] may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require." This grant of power, however, applies only in emergency situations. The statute in that event gives the district court broad jurisdiction. The EPA would read out the emergency precondition and seek the same power for its lesser, nonemergency functions, a power which Congress nowhere in the statute bestows upon them. The EPA's powers were circumscribed by a discriminating Congress. We cannot ignore the fact that Congress did not bestow certain powers that it demonstrated it knew how to bestow when it saw the need. Perhaps congressional failing to provide for the circumstance which we face was a mere oversight, but this court is not a committee to consider statutory amendments.

Even if Phase 1 is to be separated from Phase 2, it is doubtful that the EPA should be judicially given access at this time to enter to prepare for its intended construction project. As of now the EPA cannot clearly show that it will be entitled to enter the property to begin Phase 2. The

EPA seeks, however, to avoid consideration of the next step, but consideration cannot wait as the relationship between the two phases is too close.

The EPA needs help to accomplish its purposes, but the help it needs must be sought elsewhere. The EPA has no authority to do what it wants to do, and the Tucker Act neither gives that authority to the EPA, nor a remedy to OMC.

Reversed and remanded for the grant of the preliminary injunction sought by OMC pending a hearing on the merits. Circuit Rule 18 shall not apply.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SLIP NO 1
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DMC HARBOR FRONT PROPERTY
BEACH
DMC DATA PROCESSING
SLIP NO 2
DMC PLANT
LOWER WAUKEGAN HARBOR
WAUKEGAN HARBOR

APPENDIX B

UNITED STATES DISTRICT COURT, N.D. ILLINOIS, E.D.

No. 85 C 3287

OUTBOARD MARINE CORPORATION, PLAINTIFF,

v.

LEE M. THOMAS, ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, DEFENDANT.

April 30, 1985

MEMORANDUM OPINION AND ORDER

GETZENDANNER, District Judge:

This action is before the court in part on appeal from the March 20, 1985 order of Magistrate Joan Lefkow issued in the case of *In the Matter of Outboard Marine Corporation,* No. 85 M 030. 28 U.S.C. § 636(b)(3); *General Rules of the United States District Court, Northern District of Illinois* 2.44. The complaint also seeks a preliminary injunction. As no fact-finding hearing has yet been convened, the court must assume as true all well-pleaded allegations in the complaint. For the reasons stated below, the motions for preliminary injunction and for reversal of the Magistrate's order are denied.

FACTUAL ALLEGATIONS

This action concerns the efforts of the Environmental Protection Agency ("EPA") and its Administrator, Lee M. Thomas, to remedy the problem of polychlorinated bi-

phenyl ("PCB") contamination of Waukegan Harbor and surrounding areas of Waukegan, Illinois. The Outboard Marine Corporation ("OMC") owns an industrial complex on property near Waukegan Harbor. (Complaint ¶ 12). The EPA has charged that OMC is responsible for the presence of PCBs in a drainage ditch and a parking lot on OMC's property (the "North Property"). (*Id.* at ¶ 16.) The EPA has further charged that OMC is responsible for PCB contamination of property not owned by OMC, specifically the Upper Harbor and Slip No. 3 of Waukegan Harbor. (*Id.*) Waukegan Harbor is a navigable body of water servicing several industries and recreational docking facilities. (*Id.* at ¶ 15.)

Over the past several years, the EPA has sought ways to address the problem of PCB contamination in Waukegan Harbor and on OMC property. It first sought relief under various federal statutes, including the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§ 9601-9657 ("CERCLA"), in a suit pending before this court, *United States* v. *Outboard Marine Corporation, et al.*, 78 C 1004. On February 6, 1985, this court granted EPA's motion voluntarily to dismiss that action. The dismissal, however, was without prejudice to the EPA's rights to conduct its own remedial response to the contamination under CERCLA § 104, 42 U.S.C. § 9604, and to sue those responsible for the contamination under CERCLA § 107, 42 U.S.C. § 9607.

Allegedly acting under the authority of CERCLA § 104, the EPA is now attempting to clean up the PCBs in the North Property and Waukegan Harbor. The first phase of this cleanup involves access to OMC's property in order to conduct field investigations necessary for the design of the remedy. Specifically, this phase ("Phase 1") contemplates a walk-through design visit to the Waukegan Harbor Hazardous Waste Site, as well as a surveying visit and a subsurface investigation visit (requiring about 23 soil-

borings). The EPA estimates that these visits should take no more than 70 days. The walk-through visit will involve at least 16 persons and 7 vehicles; the surveying at least 3 persons and 1 vehicle; and the subsurface investigation at least 17 persons and 16 vehicles. (*Id.* at ¶¶ 45–48 and Exhibit A. With regard to Phase 1, OMC claims:

> The activities EPA seeks to perform under its warrant will cause substantial disruptions to OMC's operations by impeding OMC's access to its parking lot, plants and all of the Harbor-front property. The presence of EPA workers dressed in protective garb will have an adverse psychological impact on OMC's employees.

(*Id.* at ¶ 48.)

OMC also complains of Phase 2 of the EPA's planned action, which constitutes the actual remedy for the contamination. According to OMC, the EPA's remedial plan would seriously intrude on OMC's property. Specifically, the EPA plans to implement a dredging and removal action at a cost of $21 million and a duration of 3½ years. (*Id.* at ¶¶ 26–31). This action would involve, among other things, the removal of sediments from the North Property and Slip No. 3 and the treatment of those sediments in lagoons that will be constructed on OMC property. The site chosen for the lagoons is known as the "Harbor-front Property," a thirty-acre property owned by OMC which is not contaminated with PCBs. (*Id.* at ¶¶ 27–28.) Additionally, the EPA proposes to store the treated PCBs permanently on OMC's parking lot (part of the North Property) in a six-acre "containment cell" to be built by the EPA. (*Id.* at ¶ 29.)

Exhibit G of the complaint, a "Conceptual Site Layout" prepared by the EPA, shows the proposed locations of the structures such as the lagoons and the containment cell, to be built on OMC's North and Harbor-front Properties. OMC alleges that the removal operations will release

PCBs into the air and water of and around Waukegan Harbor; require nearly 100 daily truck-trips on OMC's property; eliminate the water intake necessary to OMC's operations; damage OMC's utility lines and data processing facilities; cause pyschological harm to OMC's more than 2,000 employees; render useless 30 acres of OMC's property during the operations; and contaminate OMC's Harbor-front Property.

According to the complaint, on February 13, 1985, EPA agents obtained an administrative warrant in an *ex parte* application to Magistrate Lefkow. The warrant, attached as Exhibit B to the complaint, authorized the EPA to enter the Waukegan, Illinois property of the Outboard Marine Company ("OMC") in order to conduct the Phase 1 activities described above. The warrant does not allow the EPA access to OMC property for purposes of carrying out Phase 2. At the April 24, 1984 status hearing before this court on this matter, the EPA stated that it could not use a warrant to gain entry for Phase 2. EPA's attorney stated that some sort of equitable action in federal district court would be used to gain this type of access.

In the warrant proceedings, Magistrate Lefkow considered the affidavits of EPA employees Rodney Lynn and Danial M. Caplice as evidence that a release or threatened release of a hazardous substance had occurred on the OMC premises in Waukegan. The Magistrate further found that representatives of OMC had refused EPA agents access to the OMC premises for purposes of conducting Phase 1 activities. (The EPA concedes that the access is not designed to investigate whether a violation of law did or is about to take place, or to determine whether OMC is in compliance with the law.) After making such findings, the Magistrate found authority for the contemplated entry in CERCLA § 104, and granted the warrant for the limited purpose of conducting Phase 1 activities.

On February 14, 1985, the day after the warrant issued, EPA agents sought entry to OMC property in Waukegan. Also on that day, OMC moved to quash the warrant. In a written opinion attached as Exhibit C to the complaint, the Magistrate denied the motion to quash on March 20, 1985. On March 21, 1985, OMC filed an emergency appeal of the ruling on the motion to quash, pursuant to Local Rule 2.44. A stay of the warrant was issued by the Emergency Judge, Chief Judge Frank McGarr, on March 21, 1985. On April 8, 1985, the present complaint for injunctive relief and for an appeal was filed. District courts have jurisdiction to review the decision of a magistrate to issue a warrant. *General Rules, supra*, at 2.44; *Weyerhaeuser Co.* v. *Marshall,* 592 F.2d 373, 377 (7th Cir.1979); *In the Matter of Sauget Industrial Research and Waste Treatment Association* v. *Marshall,* 477 F.Supp. 88, 90 (S.D.Ill.1979).

In Count I of its complaint, OMC contends that conduct of Phase 1 or Phase 2 activities on its property without authority granted by condemnation proceedings constitutes an uncompensated taking of its property and a deprivation of property without due process of law, both in violation of the fifth amendment to the federal constitution. In Count II, OMC claims that issuance of the warrant violated the federal fourth amendment, as it was issued without a finding of probable cause and in an *ex parte* hearing. As such, the warrant constituted an unreasonable search and seizure. These alleged constitutional violations have and continue irreparably to harm it. Moreover, OMC alleges other damages, such as loss of business, will result from the warrant and harm it irreparably. As relief, OMC requests the court to issue an order:

1. Quashing the warrant issued February 13, 1985;
2. Enjoining the EPA and Thomas from executing said warrant;

3. Reversing the Magistrate's March 20, 1985 ruling that denied Outboard Marine Corporation's motion to quash the warrant; and

4. Granting OMC such other and further relief as the Court deems proper.

(Complaint fol. ¶¶ 60, 70.)

APPLICABLE CERCLA PROVISIONS

CERCLA was designed to remedy hazardous waste sites, specifically abandoned or "orphan" dump sites. *United States* v. *Wade*, 546 F.Supp. 785, 792 (E.D.Pa.1982), *appeal dismissed*, 713 F2d 49 (3d Cir. 1983). It gives the EPA broad powers to clean up such sites. Section 104, the provisions under which the EPA justifies its present actions, provides that whenever any hazardous substance is released, or there is a substantial threat of release,

> the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance . . . at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment, unless the President determines that such removal and remedial action will be done properly by the owner of the . . . facility from which the release . . . emanates. . . .

CERCLA § 104(a), 42 U.S.C. § 9604(a). Subsection (b) of § 104 provides that when the President is authorized to act under subsection (a),

> he may undertake such investigations, monitoring, surveys, testing, and other information gathering as he may deem necessary or appropriate to identify the

> existence and extent of the release. . . In addition, the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter.

Subsection (e) establishes a right of access to a facility from which a release has emanated or is emanating for purposes of inspecting records and taking samples. Such access must be allowed to the President or his agents upon his request.

CERCLA's definitions make clear that the activities described above as response, remedial, and removal necessarily include entry on the waste site. To "respond" means to engage in actions defined as removal or remedial. CERCLA § 101(25); 42 U.S.C. § 9601(25). To "remove" means to clean up or remove and to dispose of the released substance. CERCLA § 101(23), 42 U.S.C. § 9601(23). The definition of "remove" continues:

> The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, [etc.]

Id. "Remedy" or "remedial action" includes actions consistent with a permanent remedy, which may be taken in addition to or instead of removal. CERCLA § 101(24); 42 U.S.C. § 9601(24); *Lone Pine Steering Committee* v. *United States Equal* [*sic*] *Protection Agency*, 600 F.Supp. 1487, 1498 (D.N.J.1985) (removal v. remedy). For purposes of CERCLA, "remedy" includes, but is not limited to,

> such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization,

> cleanup of released hazardous substances . . . recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, onsite treatment and incineration, [etc.]

After reponding to a waste site, the EPA may seek reimbursement for the costs of the response action from the responsible party. CERCLA § 107, 42 U.S.C. § 9607. It is clear from the statute that judicial review of the EPA's decision to respond to a waste site can be had only after the response action is commenced or completed. *United States* v. *Outboard Marine Corp.,.*, 104 F.R.D. 405, 411 (N.D.Ill.1984); *Lone Star*, 600 F.Supp. at 1495; *Aminoil, Inc.* v. *United States Equal* [*sic*] *Protection Agency*, 599 F.Supp. 69, 71 (C.D. Cal.1984). The statute is designed to allow the EPA to respond quickly to a hazardous waste site, and to impose liability later only after a full hearing and review of the EPA's actions.

Discussion

While OMC's allegations refer to both Phases 1 and 2 of the EPA's response action, the court finds that the present action for preliminary injunctive relief concerns only the imminent Phase 1 activities. Even had the EPA not conceded in court that Phase 2 activities could be undertaken only with court order—at least in a case such as this involving private property on which business activities are conducted—the warrant that OMC asks the court to quash permits access only for Phase 1 activities. Moreover, the EPA is not now seeking access for Phase 2 activities, and hence preliminary injunctive relief is not appropriate. Declaratory relief may be the appropriate vehicle regarding the EPA's power to carry out Phase 2; yet a request for such a declaration may be premature in light of the EPA's

admission that a court order is necessary therefor. In any event, the propriety of such a declaration regarding Phase 2 need not be examined on the expedited schedule necessary regarding the imminent Phase 1 activities.

For purposes of this motion, and accepting as true OMC's factual allegations, the court will assume that the activities of Phase 1 would constitute a "taking" such that the fifth amendment's requirement of "just compensation" is triggered. U.S. Const. amend. V; Tucker Act, 28 U.S.C. §§ 1346, 1491; *see generally Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (discussing fifth amendment implications of permanent and temporary physical invasions of real property). The court will also assume that Phase 1 will entail a deprivation of property, such that the due process requirements of the fifth amendment are implicated.

A. Taking Without Just Compensation

As mentioned above, the court assumes for this motion only that Phase 1 will entail a taking of OMC property. However, it is clear that the fifth amendment prohibits only takings without just compensation or for a non-public use. Where just compensation is provided, the takings clause is not violated. *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 697 & n. 18, 69 S.Ct. 1457, 1465 & n. 18, 93 L.Ed. 1628 (1949). The Supreme Court has clearly indicated that

> [e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking. . . . The Fifth Amendment does not require that compensation precede the taking.

Ruckelshaus v. *Monsanto Co.*, ____ U.S. ____, 104 S.Ct. 2862, 2880, 81 L.Ed.2d 815 (1984) (footnote and citations omitted). The parties accept the principle that the Tucker

Act allows an action in the Claims Court in which compensation for an authorized taking is sought. The availability of the Tucker Act remedy is presumed, upon a showing of the above-mentioned factors (that the action was authorized and for a public use), unless Congress has manifested an intent to withdraw that remedy. *Id.* at 2881. OMC does not cite to any statutory provision of legislative history demonstrating such a withdrawal here. The court finds none in its own examination of the statute. Congressional failure to mention or allow recourse to the government for compensation alone cannot "reflect an unambiguous intention to withdraw the Tucker Act remedy." *Ruckelshaus*, 104 S.Ct. at 2882. Hence, if otherwise proper, the taking contemplated here is compensable under the Tucker Act.

OMC additionally does not argue that the taking is for a private use. Considering the broad definition of public use—which is basically coterminus with the sovereign's police powers, *Hawaii Housing Authority* v. *Midkiff*, ___ U.S. ___, 104 S.Ct. 2321, 2329, 81 L.Ed.2d 186 (1984); *Ruckelshaus*, 104 S.Ct. at 2879—such an argument on the present allegations would be unavailing.

OMC does vigorously assert, however, that the court may enjoin the Phase 1 activities. This conclusion rests on two independent arguments. First, as the taking is unauthorized, according to OMC, no compensation would be allowed therefor under the Tucker Act. Hence, to allow the EPA to conduct Phase 1 activities would effectually sanction an uncompensated taking by the EPA. Since it is clear that principles of sovereign immunity are not offended by court-ordered specific relief against activities by federal officials that are *ultra vires* (outside the scope of their statutory authority or conducted pursuant to an unconstitutional statute), an injunction is an appropriate remedy in this case. *United States* v. *Lee*, 106 U.S. 196, 219-20, 1 S.Ct. 240, 259-60, 27 L.Ed. 171

(1882); *Larson* v. *Domestic & Foreign Commerce Co.*, 337 U.S. 682, 695-97, 69 S.Ct. 1457, 1464-65, 93 L.Ed. 1628 (1949); *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500, 1522 (D.C.Cir.1984), *petition for cert. filed*, 53 U.S.L.W. 3671 (March 4, 1985)* (No. 84-1398). Second, a monetary remedy would not sufficiently compensate OMC for the taking.

The court rejects the second argument, regarding the inadequacy of monetary compensation. The principle behind this argument is supported by the majority *en banc* decision of the District of Columbia Circuit in *Ramirez*. However, even accepting the principle enunciated in *Ramirez*, the court finds the present allegations insufficient to support injunctive relief based on inadequacy of remedy.

In *Ramirez*, the government had seized a substantial portion of land owned by a United States citizen in Honduras. The land was converted into a military base for purposes of military training. In addition to the expropriation of the land, the government conducted activities such as military exercises and the firing of weapons. Several head of cattle were shot by stray bullets. The landowners and their employees, living on the remaining portion of the land, felt their lives endangered by these activities. In finding that the activities should be enjoined preliminarily, the

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* On May 20, 1985, after this opinion was issued, the United States Supreme Court granted the petition for a writ of certiorari and summarily vacated the judgment. ____ U.S. ____, 105 S.Ct. 2353, 86 L.Ed.2d 255 (1985). The Court remanded the case to the District of Columbia Circuit "for reconsideration of its opinion and judgment in light of the Foreign Assistance and Related Programs Appropriations Act (Continuing Appropriations, 1985—Comprehensive Crime Control Act of 1984), Pub.L. No. 98-473 Section 127 and other events occurring since October 5, 1984."

Court discussed the availability of a Tucker Act remedy. Assuming that such a remedy was available, the Court noted that its adequacy was also an issue:

> It is clear . . . that when the monetary compensation available through the Tucker Act is so inadequate that the plaintiff would not be justly compensated for the seizure of his property by the United States, an injunctive remedy is not barred by sovereign immunity. . . . Other decisions . . . assume either explicitly or implicitly that the *adequacy* of the Tucker Act remedy is an issue; and that the gross inadequacy of money damages could justify injunctive relief when money alone would not constitute just compensation.

Ramirez, 745 F.2d at 1527 (footnote omitted and emphasis original). In effect, the Court ties the definition of "just compensation" to the adequacy of monetary compensation. This court can conceive of situations in which no amount of monetary compensation would be constitutionally sufficient. *Ramirez* might be such a case, where the taking of property involved endangering human life. Yet, these situations are few; the test for inadequacy of the legal remedy for eminent domain purposes is not coextensive with that for general equitable purposes. To hold otherwise would severely limit the scope of the United States' eminent domain power. As the dissenting opinion in *Ramirez* pointed out: "When monetary compensation would not constitute 'just compensation,' the taking could not be effected." *Id.* at 1552.

While OMC may have a stronger argument at Phase 2—where PCB's arguably would be released and could endanger the health of OMC workers—that monetary compensation is unconstitutionally inadequate, that argument does not succeed at Phase 1. Accepting as true OMC's allegations concerning the harms connected to Phase 1, all are economic in nature. The Tucker Act remedy would satisfy fully the commands of the fifth amendment.

OMC's other argument is that the unauthorized nature of the EPA's actions would render the Tucker Act unavailable. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), establishes that Executive power must stem "either from an act of Congress or from the Constitution itself." *Id.* at 585, 72 S.Ct. at 866. The EPA does not argue a right of entry stems from the constitution. Rather, it claims that provisions of CERCLA authorize its Phase 1 activities.

Statutory provision for exercise of the power of eminent domain need not state explicitly that such power may be exercised. Rather, the statute must authorize the action from which a taking may stem. *Cf. Ruckelshaus,* 104 S.Ct. at 2880 & n. 19. The District of Columbia Circuit, in a case on which OMC relies heavily, explains the test as follows:

> Whether an action of Executive officials is sufficiently authorized by congressional or constitutional provision to permit a claim under the Tucker Act depends upon the nature of the facts of the particular case and the scope of the defendants' lawful powers. Not all illegal acts of government officials are considered unauthorized for the purpose of determining the government's liability to pay compensation under the Tucker Act. The question in each case is whether the defendants' actions are substantially in compliance with the powers granted to them by congressional statute or constitutional provisions. Recovery under the Tucker Act has been permitted when a taking by an officer is a natural consequence of congressionally approved measures or the result of an exercise of discretion granted to an official for the implementation of a congressional statute.
>
> However, when an officer acts wholly outside the scope of [these powers], the official's actions have been considered to be unauthorized for the purposes of a damages remedy under the Tucker Act.

Ramirez, 745 F.2d at 1523 (footnotes omitted).

Acting without statutory power at all, or misapplying one's statutory power, will result in a finding that such action was *ultra vires*. It is clear additionally that acting without constitutional authority will support a denial of a Tucker Act remedy. *Id.* at 1522-23; *see also id.* at 1551 n. 3 and 1554 ("the question whether a government officer was acting sufficiently within his authorized powers to permit a Tucker Act remedy is precisely the same as the question whether he was acting sufficiently within his powers to preclude injunctive relief against him") (dissenting opinion of Judges Scalia, Bork, and Starr). Regarding the claim that the contemplated action is unauthorized, therefore, the court must ask whether the intended action is authorized by statute or constitution.

In this case, the EPA is seeking entry to OMC's property. Regarding statutory right of entry, the EPA first argues that subsection (e) specifically allows a right of entry for Phase 1 activities. The court accepts OMC's argument that § 104(e) concerns only entry for the examination of records and taking of samples. OMC argues further that the absence of a right of entry in § 104(b) (allowing for planning investigations) coupled with the reference to such a right in § 104(e) establishes that CERCLA provided no right of entry for on-site inspections and response actions.

The absence of a reference to right of entry in § 104(b) does not strike the court as significant. Inspection of records and documents can be accomplished without entry, such as through the less intrusive administrative subpoena duces tecum. At least one court has found that a provision allowing "access" to documents but not entry for purposes of examining documents, did not allow the enforcement agency to obtain a search warrant for purposes of entering the premises and inspecting the documents. *Midwest Growers CoOp Corp.* v. *Kirkemo*, 533 F.2d 455, 462 (9th Cir.1976) (agency must follow congressionally

established injunctive proceeding in order to gain access to records). Unlike inspection of documents, inspection of physical premises cannot be accomplished through administrative subpoena. Thus, there is a legitimate distinction between searches under § 104(b) and (e) justifying the latter subsection's explicit reference to the right of "entry."

Having determined that § 104(e)'s reference to entry does not preclude inferring a right of entry under § 104(b), the court must examine whether the statute supports such an inference. The scope of remedial and removal actions that comprise permissible response actions, as described in § 101, necessarily includes access to the waste site. In addition, violation-detecting investigations (including surveys and monitoring) and response-planning investigations require access to the site. OMC does not argue that the statute was designed to remedy only government-owned sites. While the statute addresses the problem of abandoned sites, many of them will be on privately-owned property. The fact that the OMC site is privately owned and still occupied, then, does not take it out of CERCLA's scope.

The scope of response actions coupled with the presumption that waste sites will in many cases be privately owned, therefore, persuade the court that CERCLA allows the EPA entry to a privately-owned site for purposes of investigation and response. The statute is silent, however, on the mechanism by which access is to be achieved. Subsection (e) provides that access must be allowed on demand, but no similarly descriptive language exists in § 104(a) or (b).

The court's own research reveals no case exactly on point. Of the many reported CERCLA decisions, most do not involve a waste site on which the owner is conducting business. This may explain the lack of precedent on the issue of EPA access to private property. The closest case

factually is *Industrial Park Development Company* v. *Environmental Protection Agency*, 604 F.Supp. 1136 (E.D.Pa.1985), since it concerns a dispute by the EPA and the property owner over which should conduct cleanup activities. In that case, it appears that the EPA simply entered the land, without warrant or judicially-granted authority. However, the case is not legally helpful.

Courts have addressed the issue of an administrative agency's remedy where a statute allows a right of entry but provides no mechanism to accomplish it. The Ninth Circuit has held that where a statute provides a right of entry, an *ex parte* administrative warrant may be used to obtain entry. *Midwest,* 533 F.2d at 462; *Bunker Hill Company Lead and Zinc Smelter* v. *U.S. Environmental Protection Agency,* 658 F.2d 1280, 1285 (9th Cir.1981); *In re Order Pursuant to Section 3013(d) RCRA,* 550 F.Supp. 1361, 1364 (W.D.Wash. 1982). OMC relies on *Midwest* for the proposition that where a statute provides a right but not a remedy, the court may infer only a civil injunction action to enforce the right. However, in *Midwest,* a comparable provision in the same statute concerning access to records specifically provided for an injunction as the method of enforcing the right to access. Hence, congressional intent to allow only an injunction action was clearly present in that statute.

These principles persuade the court that an administrative warrant may be the vehicle for conducting a violation-detection search under § 104(b). OMC next argues that a warrrant is not the proper vehicle for a response-planning investigation. According to OMC, a warrant is designed to allow an investigation for a specific legal violation when supported by probable cause or for an investigation pursuant to reasonable and neutral standards for purposes of monitoring legal compliance. The court agrees that the use of a warrant to plan the response, after the violation has been established, is unusual in light of

the common understanding of the purposes of a search warrant. The EPA has not provided the court, and the court's own research does not reveal, an example of a warrant being used in a situation such as this.

Yet, the Phase 1 activities do constitute a search. Moreover, Phase 1 (for which a warrant is sufficient) and Phase 2 (for which the EPA concedes a court order is necessary) are distinguishable for purposes of determining the extent of due process required before their execution. At Phase 1, the EPA will examine the feasibility of its projected cleanup; the investigation may result in a reversal of its conclusions regarding the appropriateness of Phase 2. Since warrants have issued for violation-detection searches as intrusive as the planning search desired here, *In re Order, supra*, the use of the same procedure for both types of searches is a sensible interpretation of an otherwise ambiguous statute.

This perception is supported by the court's interpretation of the issues that would be relevant in a hearing before any type of § 104(b) search. Whether the search is to plan a response or to determine the need for a response, the issues to be aired before a warrant or injunction authorizing entry are severely circumscribed by the statute. The finding of a violation and the choice of a response are issues that cannot be litigated until the cost-recovery suit, if any. The EPA may conduct any type of § 104(b) search when authorized to act under § 104(a), namely, when a hazardous substance is released. Because the EPA's determination is not subject to judicial review, the pre-search inquiry is whether the EPA has made such a determination. Thus, the type of inquiry to be made for a response-planning search is the same as that necessary for a violation-detection search. Both involve issues traditionally presented to magistrates in administrative search warrant proceedings: allegations that a legal violation on

the premises brings into play government regulatory power. In such a proceeding, the neutral magistrate takes evidence on the cause for the search (probable cause or neutral monitoring procedures), reviews the scope of the search for reasonableness, and examines the legal authority for the warrant. The warrant itself and the Magistrate's March 20, 1985 opinion denying the motion to quash reveal that these steps were followed. (See also the EPA's undisputed recitation of the evidence the Magistrate had before her in the warrant proceeding. United States' Reply, filed 4/22/85, pp. 15-16.)

Thus, the court agrees with the EPA's interpretation of CERCLA, to which it must grant deference, *Udall* v. *Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965), that a warrant proceeding is a proper vehicle for obtaining entry under § 104(b) for all purposes. The final issue regarding statutory authorization is whether the proceeding should have been of an adversary or *ex parte* character. OMC contends that an *ex parte* hearing may only be used to obtain a warrant when administrative goals require a surprise appearance. This proposition has been rejected by at least one circuit. *Bunker Hill Company*, 658 F.2d at 1285. Again, the court agrees with the EPA that an *ex parte* proceeding was constitutionally sufficient, although an adversary proceeding would be preferable. This conclusion flows from the limited nature of the issues before the Magistrate. It is significant, additionally, that in OMC's voluminous papers, there is little indication of what evidence or arguments it would have presented to the magistrate. OMC does note that it would have told the Magistrate that there are no PCBs on the Harbor-front Property. However, the EPA did not represent that PCBs were on that property. And, it cannot be argued that the EPA is limited in its planning investigation only to those areas contaminated by PCBs. Since the response authority includes the construction of on-site

structures, the search of appropriate areas contiguous to contaminated areas, especially where the contaminated areas are bodies of water, for purposes of such construction is proper.

The court therefore finds that CERCLA authorizes both the requested search and the procedures by which the EPA sought entry to the premises to conduct the search. Since CERCLA authorizes the use of an *ex parte* administrative warrant for purposes of carrying out its duties under § 104(b), recourse to a magistrate to obtain the warrant was also proper. 28 U.S.C. § 636(b)(3); *General Rules, supra,* at 1.70(B)(L)(M); 2.40(a). This supports the existence of a Tucker Act remedy. Hence, the takings clause does not support OMC's motion.

B. Search and Seizure

Regarding the fourth amendment, the court finds that the previous discussion established no such violation here. OMC's allegations regarding the scope of Phase 1 establish that EPA representatives will carry out soil borings and surveying activities. The intrusion, however, is reasonable given the goal of the investigation and the public interest involved. Moreover, the Magistrate's warrant is sufficiently definite and limited in scope. At least one other court has determined that a warrant similar to that issued here is constitutionally sound. *In re Order, supra.* Finally, the warrant was issued after the Magistrate heard evidence of the contamination and the EPA's intended response action. This provided sufficient statutory authority for the search. The court therefore rejects OMC's fourth amendment argument.

C. Deprivation of Property Without Due Process

The court has noted that it will assume that Phase 1 involves a deprivation of property triggering the fifth amendment's requirement of due process. The amount of

process due attendant to any particular deprivation is variable. The factors to be considered are the private interest affected by the official action, the risk of erroneous deprivation of the interest through the procedures used and the probable value of additional procedures, and the government's interest (including the fiscal and administrative burdens) that the additional requirement would entail. *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). Neither party has addressed the *Mathews* factors. However, the court's own examination persuades it that OMC has not shown a likelihood of success on the merits of the issue. *Roland Machinery Co.* v. *Dresser Industries*, 749 F.2d 380 (7th Cir. 1984).

The question is whether the *ex parte* warrant proceedings provide sufficient process for any deprivation attendant to the Phase 1 search. The court has already determined that the inquiry in a warrant proceeding under § 104(b) is limited and simple. OMC has not explained the value of an adversary proceeding for purposes of preventing an erroneous deprivation under these circumstances. Moreover, the government interest in executing the search is substantial. While the court accepts OMC's allegation that the deprivation involved in Phase 1 is substantial as well, this does not overcome a failure to explain the value of additional process. The court therefore finds a lack of likelihood of success on the merits of the fifth amendment claim. For this reason, the court will not grant an injunction based on OMC's claim of a violation of due process rights.

Conclusion

OMC's motion for reversal and motion for preliminary injunction are denied in full. The government's motion to dismiss is taken under advisement.

It is so ordered.

APPENDIX C

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 85-1753

OUTBOARD MARINE CORPORATION, PLAINTIFF-APPELLANT,

v.

LEE M. THOMAS, ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, DEFENDANTS-APPELLEES.

No. 85 C 3287

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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Judge Susan Getzendanner

September 23, 1985

Before Hon. WILLIAM J. BAUER, Circuit Judge, Hon. HARLINGTON WOOD, JR., Circuit Judge, Hon. ROBERT A. GRANT, Senior District Judge*

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED AND REMANDED, with costs, in accordance with the opinion of this Court filed this date.

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* The Honorable Robert A. Grant, Senior District Judge from the Northern District of Indiana, is sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 85-1753

OUTBOARD MARINE CORPORATION, PLAINTIFF-APPELLANT,

v.

LEE M. THOMAS, ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, DEFENDANTS-APPELLEES.

Nos. 85 C 3287 and 85 M 030

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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Susan Getzendanner, *Judge.*

November 25, 1985

Before Hon. WILLIAM J. BAUER, Circuit Judge, Hon. HARLINGTON WOOD, JR., Circuit Judge, Hon. ROBERT A. GRANT, Senior District Judge*

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause on November 6, 1985, by defendants-appellees, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Robert A. Grant, Senior District Judge from the Northern District of Indiana, is sitting by designation.

APPENDIX E

Statute Involved

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 provides in pertinent part (42 U.S.C. 9601, 9604 and 9606):

§ 9601. Definitions.

For purpose of this subchapter, the term—

* * * * *

(23) "remove" or "removal" means the cleanup or removal of released hazardous substances from the environment, * * * such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for * * *.

(24) "remedy" or "remedial action" means those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment. The term

includes, but is not limited to, such actions at the location of the release as storage, confinement, perimeter protection using dikes, trenches, or ditches, clay cover, neutralization, cleanup of released hazardous substances or contaminated materials, recycling or reuse, diversion, destruction, segregation of reactive wastes, dredging or excavations, repair or replacement of leaking containers, collection of leachate and runoff, on-site treatment or incineration, provision of alternative water supplies, and any monitoring reasonably required to assure that such actions protect the public health and welfare and the environment * * *.

* * * * *

The term does not include offsite transport of hazardous substances, or the storage, treatment, destruction, or secure disposition offsite of such hazardous substances or contaminated materials unless the President determines that such actions [meet specified criteria];

(25) "respond" or "response" means remove, removal, remedy, and remedial action;

* * * * *

§ 9604. Response authorities.

(a)(1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange

for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment, unless the President determines that such removal and remedial action will be done properly by the owner or operator of the vessel or facility from which the release or threat of release emanates, or by any other responsible party.

* * * * *

(b) Whenever the President is authorized to act pursuant to subsection (a) of this section, or whenever the President has reason to believe that a release has occurred or is about to occur, or that illness, disease, or complaints thereof may be attributable to exposure to a hazardous substance, pollutant, or contaminant and that a release may have occurred or be occurring, he may undertake such investigations, monitoring, surveys, testing, and other information gathering as he may deem necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or to the environment. In addition, the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to

plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter.

* * * * *

(e)(1) For purposes of assisting in determining the need for response to a release under this subchapter or enforcing the provisions of this subchapter, any person who stores, treats, or disposes of, or, where necesary to ascertain facts not available at the facility where such hazardous substances are located, who generates, transports, or otherwise handles or has handled, hazardous substances shall, upon request of any officer, employee, or representative of the President, duly designated by the President, or upon request of any duly designated officer, employee, or representative of a State, where appropriate, furnish information relating to such substances and permit such person at all reasonable times to have access to, and to copy all records relating to such substances. For the purposes specified in the preceding sentence, such officers, employees, or representatives are authorized—

(A) to enter at reasonable times any establishment or other place where such hazardous substances are or have been generated, stored, treated, or disposed of, or transported from;

(B) to inspect and obtain samples from any person of any such substance and samples of any containers or labeling for such substances. Each such inspection shall be commenced and completed with reasonable promptness.* * *

* * * * *

§ 9606. Abatement actions.

(a) In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

* * * * *

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(2)

No. 85-1735

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LEE M. THOMAS, Administrator, Environmental Protection Agency, and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioners,

v.

OUTBOARD MARINE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*, authorizes the United States Environmental Protection Agency to utilize an ex parte warrant to enter private property to carry out a three and one-half year construction project there for the treatment and storage of sediments removed from adjacent property, when the entry would cause substantial disruptions to the owner's business and expose its employees to potential danger.

PARTIES TO THE PROCEEDING

Outboard Marine Corporation is respondent herein. There is no parent corporation of Outboard Marine Corporation. Outboard Marine Corporation has an ownership interest in Adventurent, Inc. OMC wholly owns its other subsidiaries.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
INTRODUCTION	2
SUPPLEMENTAL STATEMENT OF CASE	2
REASONS WHY THE WRIT SHOULD BE DENIED	7
1. No Public Purpose Would Be Served By Permitting EPA Access To OMC's Property At This Time	7
2. EPA Has Not Shown That The Lower Court's Decision Is Impeding Any Remedial Actions	10
3. The Seventh Circuit Properly Interpreted The Superfund Statute	11
CONCLUSION	16
APPENDIX A	1a
APPENDIX B	2a
APPENDIX C	3a
APPENDIX D	8a

TABLE OF AUTHORITIES

CASES:	PAGE
City of Bloomington, Indiana v. Westinghouse Electric Corporation, Consolidated Cases IP 83-9-C, Order (S.D. Ind. May 2, 1986)	10
Delaware L. & W. R.R. Co. v. Morristown, 276 U.S. 182 (1928)	13, 14
Outboard Marine Corporation v. Thomas, 610 F. Supp. 1234 (N.D. Ill. 1985)	6
Outboard Marine Corporation v. Thomas, 773 F.2d 883 (7th Cir. 1986)	9, 11, 12, 13
United States v. 67.59 Acres of Land, 415 F. Supp. 544 (M.D. Pa. 1976)	14
United States v. 20.53 Acres of Land, 263 F. Supp. 694 (D. Kan. 1967)	14
United States v. Outboard Marine Corporation, 104 F.R.D. 405 (N.D. Ill. 1984), *aff'd*, No. 85-1584, slip op. (7th Cir. April 22, 1986)	5

STATUTES AND REGULATIONS:	PAGE
10 U.S.C. § 2663 (1982)	14
10 U.S.C. § 2664 (1982)	14
16 U.S.C. § 423k (1982)	14
33 U.S.C. § 591 (1982)	14
Federal Water Pollution Control Act, § 311(c), 33 U.S.C. § 1321(c) (1982)	12
Resource Conservation and Recovery Act of 1976, § 7003, 42 U.S.C. § 6973 (Supp. II, 1984) ...	12

Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.*: 2, 12

§ 104(a), 42 U.S.C. § 9604(a) 13

§ 104(b), 42 U.S.C. § 9604(b) 13

§ 104(c)(3), 42 U.S.C. § 9604(c)(3) 11

§ 104(e), 42 U.S.C. § 9604(e) 13

§ 105, 42 U.S.C. § 9605 15

§ 106, 42 U.S.C. § 9606 ..... 9, 10

40 C.F.R. Pt. 300 15

50 Fed. Reg. 47,912 (Nov. 20, 1985) 15

MISCELLANEOUS: PAGE

Environmental Protection Agency Conceptual Design, Document No. 13-5M28.0 W65328.00 (Sept. 14, 1984) 6

Hazardous and Toxic Waste Disposal: Joint Hearings Before the Subcomms. On Environmental Pollution And Resource Protection Of The Senate Comm. On Environmental And Public Works, 96th Cong., 1st Sess. (1979) 12, 13

Hazardous and Toxic Waste Disposal Field Hearing: Joint Hearings before The Subcomms. On Environmental Pollution and Resource Protection Of The Senate Comm. On Environmental And Public Works, 96th Cong., 1st Sess (1979) . 14, 15

Nichols on Eminent Domain 3d ed. (1983) 14

No. 85-1735

IN THE

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OCTOBER TERM, 1985

LEE M. THOMAS, Administrator, Environmental Protection Agency, and the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Petitioners,

v.

OUTBOARD MARINE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

This matter is pending on the petition of Lee M. Thomas and the United States Environmental Protection Agency ("Petitioners" or "EPA") for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit. Respondent Outboard Marine Corporation ("OMC") submits this response in opposition to that petition, and respectfully requests that the petition be denied.

INTRODUCTION

At issue in this case is the EPA's authority in non-emergent circumstances to obtain an ex parte warrant under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* ("Superfund" or "CERCLA") for the purpose of beginning a three and one-half year construction project on private, uncontaminated property. The court below found that such authority does not exist. Neither that ruling, nor the circumstances surrounding this case, justify this Court's review.

SUPPLEMENTAL STATEMENT OF CASE

While this case was only commenced in 1985, it grew out of circumstances and litigation stretching back to 1976. Petitioners' brief omits many crucial background facts. The district court denied OMC's motion for preliminary injunction without a hearing and without any discovery. The following facts were submitted by OMC in support of its motion and were not disputed by Petitioners.

OMC is a manufacturer with its principal place of business in Waukegan, Illinois. For nearly fifty years, OMC has manufactured outboard motors, and other products at its facilities near Waukegan Harbor. OMC currently employs over 2,000 manufacturing, service and office personnel at its Waukegan Harbor operations (R.A. 1, ¶ 12; R.A. 6, ¶¶ 1, 11).[1]

[1] References to documents in the record on appeal in the Seventh Circuit are cited herein as "R.A." followed by the number of the document in the clerk's list of documents.

OMC's Waukegan Harbor facilities are the exclusive source of critical parts used in finished products assembled at other OMC plants. Those other plants also rely on the Waukegan Harbor facilities for their data processing, engineering and design services. These critical services are performed in no other OMC facility in the United States or abroad (R.A. 1, ¶¶ 12, 42; R.A. 6, ¶ 23).

As the map accompanying the lower court's decision shows (App. A, *infra*; R.A. 1, Exhibit E; R.A. 6, Exhibit E), the property at issue in this case includes a thirty acre tract of land owned by OMC directly adjacent to Waukegan Harbor (the "Harbor-front property"). On that thirty acres, OMC operates its world-wide computer-based data processing center, its world-wide engineering facility and its world-wide die cast and machinery facility. EPA does not seek to clean up that property, because it has never contended it is contaminated or requires any remedial action. Instead, EPA intends to occupy the Harbor-front property to construct massive treatment lagoons, batch plants, dewatering lagoons and pumping stations. EPA hopes to utilize that property to treat materials dredged out of the adjacent Waukegan Harbor. EPA also intends to construct a fifteen foot high containment cell covering several acres of OMC's parking lot to serve as a permanent storage area for materials removed from Waukegan Harbor (R.A. 1, ¶ 28; R.A. 6, ¶ 9).[2]

OMC does not own Waukegan Harbor, nor has it ever been adjudged liable for any environmental harm or threat relating to Waukegan Harbor. At no time has EPA or any other governmental agency instituted condemnation proceedings to acquire title to any part of OMC's prop-

[2] A map showing EPA's design plans for OMC's Waukegan Harbor facilities is appended hereto (App. B, *infra*; R.A. 1, Exhibit G; R.A. 6, Exhibit F).

erty. No court ruling requires OMC to sacrifice its property to EPA's project (R.A. 1, ¶ 18; R.A. 6, ¶ 3).

The EPA's interest in Waukegan Harbor began ten years ago when it began to claim that there were deposits of polychlorinated biphenyls (PCBs) in the bottom sediments of Waukegan Harbor, and that OMC's die cast operation was the source of those deposits. Two years later, in 1978, EPA sued OMC in the United States District Court for the Northern District of Illinois, *United States v. Outboard Marine Corporation*, No. 78 C 1004 (the "*OMC*" case) charging that PCBs in one slip of Waukegan Harbor and in areas of OMC's property north of the Harbor constituted a threat to the environment (R.A. 1, ¶ 20).

During the over seven years the *OMC* case was pending, the parties compiled an enormous amount of evidence relating to potential health effects from PCBs. After the completion of all those studies and sampling programs, EPA expressly conceded that it had no evidence that PCBs in this area were adversely affecting local residents, fish, drinking water or air.[3] Those admissions were made after PCB deposits had been in Waukegan Harbor for at least thirty years.

Throughout the litigation, OMC sought a trial to resolve the cental issue in the case—whether PCBs in Waukegan Harbor and on certain areas at the north end of OMC's property posed any threat to health or the environment. When the *OMC* case was virtually ready for trial, however, EPA moved to dismiss its case voluntarily.

---

[3] Relevant excerpts from EPA's record admissions are appended hereto (App. C, *infra*), and were filed in the district court as an exhibit to the complaint and motion for preliminary injunction (R.A. 1, Exhibit F; R.A. 6, Exhibit G).

After the *OMC* case was dismissed,[4] and without warning to OMC, EPA obtained an ex parte warrant from a magistrate of the district court. The warrant purported to authorize EPA to enter OMC's property to carry out the first phase of its three and one-half year construction project (R.A. 1, ¶ 2; R.A. 6, ¶¶ 1-2). In that first phase, EPA intended to bring thirty-five workers all privately employed, onto OMC's Harbor-front property to do soil borings, remove earth to locate underground utility lines, and install permanent markers. The warrant would have required OMC to give unrestricted access to EPA's workers for seventy days, during which they would have brought in ten trucks, eight automobiles, several vans, a trailer-mounted steamcleaner, numerous massive drill rigs, a job trailer, a waste hauler, a bulldozer and other unspecified "miscellaneous drilling equipment" (R.A. 1, ¶¶ 45-47; R.A. 6, ¶¶ 15-16).

This work, and EPA's later construction work, would have had a profound effect on OMC's operations and on its 2,000 employees in the area. EPA's "remedy" would completely preclude OMC from using the thirty acres of Harbor-front property for the three and one-half years EPA intends to occupy that land with its open lagoons and pumping systems. EPA's use of that property to dewater sediments from Waukegan Harbor would permanently damage that property. OMC would also be permanently excluded from the six acres of its parking lot where EPA expects to locate its PCB containment cell (R.A. 1, ¶¶ 26- 42, 48; R.A. 6, ¶¶ 21-23).

The excavation and construction EPA intends to perform on OMC's Harbor-front property would produce

[4] *United States v. Outboard Marine Corp.*, 104 F.R.D. 405 (N.D. Ill. 1984), *aff'd*, No. 85-1584, slip op. (7th Cir. April 22, 1986).

ground vibrations and airborn dust that would disrupt and potentially shut down OMC's computer system. Because the Waukegan Harbor facility services all of OMC's facilities in the United States and worldwide, EPA's actions on OMC's property would affect those other facilities as well (*Id.*).

EPA's dredging of Waukegan Harbor and open-air treatment of sediments on OMC's Harbor-front property would release PCBs into the water and air directly adjacent to OMC's assembly plant, data processing operation and design and engineering facility on the Harbor-front property. EPA has itself acknowledged that its "construction, excavation and trenching" will pose substantial health and safety hazards to persons in the area (*Id.*).[5]

The construction work on OMC's property would also disrupt or eliminate OMC's access to and from its own facilities. Parts produced by OMC's Waukegan plants are essential to the continued operation of OMC's other facilities. The loss of the Waukegan manufacturing capability would therefore cause extensive hardship to OMC's other facilities (*Id.*).

The work EPA intended to perform under its February 13 warrant would also have excluded OMC from the use of its property and would have caused substantial disruptions to OMC's operations. EPA's drill rigs, trucks, waste haulers and other heavy equipment would disrupt traffic at OMC's facilities and could endanger its workers. EPA's

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[5] Environmental Protection Agency, Conceptual Design, Document No. 13-5M28.0 W65328.00 (Sept. 14, 1984). Because the district court disposed of OMC's motion for preliminary relief without permitting discovery or hearing any testimony, *Outboard Marine Corporation v. Thomas* 610 F. Supp. 1234 (N.D. Ill. 1985), this EPA document was never introduced into evidence, and consequently, it is not in the record on appeal.

soil boring and earth removal activities would likely damage OMC's utility lines and water mains. EPA's borings on OMC's parking lot would preclude OMC from the use of that area and damage the foundations of the parking lot (*Id.*).

REASONS WHY THE WRIT SHOULD BE DENIED

Based upon the foregoing undisputed facts, the Seventh Circuit held that OMC was entitled to a preliminary injunction barring EPA from executing the February 13 warrant to begin the construction project on OMC's property. EPA claims that this Court should imply authority from the statute to carry out this project, because the agency needs such access in this and other cases. That claim is meritless. The decision below has not resulted in any hardship to EPA in this case or in others. Moreover, as the Seventh Circuit held, the statute's general grant of authority to the agency cannot support a broad power, in a non-emergency situation, to take over private property and completely disrupt ongoing industrial operations.

1. No Public Purpose Would Be Served By Permitting EPA Access To OMC's Property At This Time.

As the foregoing facts demonstrate, this case does not involve a routine Superfund landfill. The target of EPA's efforts is a large manufacturing complex which employs thousands of workers providing services and products for numerous other OMC facilities around the world. The vast

majority of OMC's Waukegan Harbor property is uncontaminated, and EPA does not contend otherwise. EPA states only that the most northern portion of OMC's property contains PCBs. The Harbor-front property is at the southern-most end of that property and is contiguous to no other parcel of OMC's property included in EPA's project.[6]

EPA has never made these facts clear to the magistrate and courts that have addressed this matter. Instead, it has consistently attempted to foster the assumption that the "OMC site" is a typical contaminated Superfund site. EPA does this by referring to OMC's property, together with Waukegan Harbor, generally as "the site." It continues this subtle but critical misrepresentation before this Court where it states, "EPA estimates that *the site* contains approximately 1.1 million pounds of PCBs" (Pet. Br. at 2, emphasis added). Elsewhere, Petitioners summarize the statements EPA made to the magistrate:

> In its warrant application, EPA stated that there had been a release of PCBs into the environment *at the Waukegan Harbor site*, and that an *on site* remedial response was necessary to prevent PCB migration.

(Pet. Br. at 5, emphasis added, citations omitted). In fact, EPA does not claim that OMC's property contains 1.1 million pounds of PCBs, nor has it ever claimed that there has been a release of PCBs from the Harbor-front property. EPA does not claim that "a remedial response is necessary to prevent PCB migration" from that property.

Petitioners' nomenclature deftly misrepresents the facts by falsely implying both that OMC's property is contaminated and that OMC owns Waukegan Harbor. By implying that the target of its remedy is a typical Super-

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[6] *See* the maps appended hereto, App. A and B, *infra*.

fund site, EPA is able to avoid any consideration of the effects its occupation of OMC's property will have on OMC's operations and employees, or on other businesses in the area.[7]

The "problem," which ostensibly justifies EPA in taking over thirty acres of OMC's property, has existed for thirty years with, as Petitioners concede (App. C, *infra*), no identifiable adverse effects whatsoever. EPA has itself been studying the situation since 1976. As the lower court aptly stated, "There is no imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance [in the Waukegan Harbor area]. If there is an emergency, it is almost ten years old." *Outboard Marine Corporation v. Thomas*, 773 F.2d 883, 886 (7th Cir. 1986). The government's requests for, and full use of numerous extensions for the filing of its petition for rehearing below and its Petition to this Court further demonstrate the absence of any pressing need for access to OMC's property. In these circumstances, there can be no legitimate claim that the Seventh Circuit's decision is in any way contrary to the public welfare.[8]

---

[7] Adjacent to Waukegan Harbor are two marinas and several other businesses. They all utilize Waukegan Harbor on a daily basis. EPA's "remedy" could close down those businesses during the years of dredging and dewatering, and possibly beyond.

[8] Petitioners dispute the Seventh Circuit's statements that this matter does not involve an "imminent and substantial endangerment" (Pet. Br. at 10 n.16). EPA's Second Amended Complaint in the companion *OMC* case included an imminent and substantial endangerment claim under Section 106 of Superfund, 42 U.S.C. § 9606. In the resolution of the *OMC* case, EPA covenanted never to proceed against OMC in this matter under the imminent and substantial endangerment provisions. Petitioners certainly agree that there is no environmental emergency of any kind in the Waukegan Harbor area.

2. EPA Has Not Shown That The Lower Court's Decision Is Impeding Any Remedial Actions.

Petitioners contend that the Seventh Circuit's decision "is . . . likely to have a direct and immediate impact on EPA's ability to clean up the other 48 sites on EPA's National Priorities List within the Seventh Circuit" (Pet. Br. at 8). Petitioners also claim that the decision below "casts doubt" on their actions at hundreds of other sites across the country (*Id.*). Such vague and unsupported allegations of impending disaster do not justify this Court's intervention.

Even within the Seventh Circuit, EPA has specifically been granted access to property adjacent to a Superfund landfill for the purpose of carrying out long term remedial actions there.[9] EPA obtained access in that case after the Seventh Circuit's decision by proceeding under Section 106 of Superfund, 42 U.S.C. § 9606, and alleging the existence of an "imminent and substantial endangerment" in a situation that had been under study since 1975. That action completely belies EPA's claims that Section 106 provides it with no authority to obtain access to remedial sites (Pet. Br. at 11). In view of EPA's theory that "imminent and substantial endangerments" need be neither imminent nor substantial (Pet. Br. at 11 n.16), it is hard to understand how it can claim that "the Section 106 process can be cumbersome and lengthy" (Pet. Br. at 11).

The Seventh Circuit's ruling does not eliminate EPA's ability in proper cases, and through proper procedures, to obtain access to hazardous waste sites. CERCLA envisions an active role by the states in remedial actions

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[9] *City of Bloomington, Indiana v. Westinghouse Electric Corporation*, Consolidated Cases IP 83-9-C, Order (S.D. Ind. May 2, 1986). A copy of the order granting EPA access to the site is appended hereto (App. D, *infra*).

paid for by the Superfund, 42 U.S.C. § 9604(e)(3), and thus state powers over private property are available to the EPA. This Court's consideration of the Seventh Circuit's decision is therefore not necessary to EPA's ability to obtain access to Superfund sites.

3. The Seventh Circuit Properly Interpreted The Superfund Statute.

Throughout the proceedings below, EPA refused to confront the legality of its entry onto OMC's property to implement a three and one-half year construction project to dredge Waukegan Harbor. In each of the proceedings prior to the present Petition, the government demanded that the court ignore the three and one-half year construction work and view its seventy day entry as if it were being carried out for its own purposes—not as the first step in the larger project. As the Seventh Circuit stated, "The EPA is alone in denying that surveying the site, placing survey monuments, locating utility lines, and taking weight-bearing subsurface test samples of soil are not, as a usual and practical matter, the first things to be done at a construction site." 773 F.2d at 888.

Moreover, contrary to the government's present position, Petitioners have regularly admitted, both tacitly and finally expressly, that the statute provides at best dubious grounds for entry to do construction work.[10] Now for the

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[10] In the district court, Petitioners expressed puzzlement over the manner in which they would obtain access to perform the actual construction work:

> MR. HYNES: . . . But if you are getting into the question—and I don't think it should be gotten into here—but if it is for the whole remedy, going in, do the actual construction, all of that, a warrant is not appropriate.
>
> THE COURT: Okay. What would you be doing?

(Footnote continued on following page)

first time, Petitioners press the contention that the statute authorizes them to take over an ongoing industrial operation for the purpose of carrying out a remedy on adjacent property. The statute cannot be interpreted to authorize such extreme action. Petitioners acknowledge that the statute lacks express authority. They argue, however, that the statute must nevertheless be interpreted implicitly to authorize the kind of large scale condemnation and disruption envisioned by EPA's remedy.

Congress intended the Superfund legislation to fill in gaps in the then-existing legislative scheme which provided cleanup authority for spills in water[11] and for active waste disposal sites on land.[12] Superfund was passed primarily as a response to abandoned and inactive waste sites, which were not covered under prior law.[13] There

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[10] *continued*

MR. HYNES: Basically we probably would be filing an affirmative action in the district court, you know, maybe something in terms of a declaratory judgment, some action like that. I am not exactly sure of the exact form it would take.

THE COURT: I see.

(Transcript of Proceedings, April 24, 1985, R.A. 23 at 3-4). As the Seventh Circuit found, when pressed on this point Petitioners expressly conceded that only new legislation would provide them with access authority to perform the remedy. 773 F.2d at 886, 888.

[11] Federal Water Pollution Control Act, § 311(c), 33 U.S.C. § 1321(c) (1982).

[12] Resource Conservation and Recovery Act of 1976, § 7003, 42 U.S.C. § 6973 (Supp. II 1984).

[13] Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. § 9601 *et seq.* (1982)). The legislative hearings are replete with statements by sponsors of the various bills about the problems presented by abandoned waste sites. *See, e.g. Hazardous and Toxic Waste Disposal Joint Hearings Before the Subcomms. on Environmental Pollution and Resource Protection of the Senate Comm. on Environment and Public Works*, 96th Cong., 1st Sess. 1 (1979) (statement of Senator Culver) ("we are searching for solu-

(Footnote continued on following page)

is no evidence that Congress intended the statute to authorize EPA arbitrarily to close down an ongoing business and to carry out a massive three and one-half year construction project there merely because doing so would advance its remedial work on adjacent property.

None of the sections of the statute EPA cites in its brief provides the broad authority it hopes to read into the Superfund statute. In the lower court and in their warrant, Petitioners cited Section 104(e), 42 U.S.C. § 9604(e), as "most germane" to its access demand. 773 F.2d at 889. They now have abandoned that position, and instead look to Sections 104(a) and (b) as the ostensible sources of their claimed access authority. 42 U.S.C. §§ 9604(a), (b). As the Seventh Circuit properly held, 773 F.2d at 888-89, those sections are merely general authorizations for EPA to carry out cleanups funded by the Superfund. They do not authorize the agency to take over private, uncontaminated property to implement a remedy in an adjacent harbor.

Petitioners' citations to cases in which the court upheld the government's right to carry out compliance inspections and investigations (Pet. Br. at 14-15) do not support their argument. As this Court has stated, condemnation powers will not be implied as a mere corollary of other general agency authority, "It is to be borne in mind that the taking of private property for public good is deemed to be against the common right and authority to do so must be clearly expressed." *Delaware L. & W. R.R. Co.*

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[13] *continued*
tions to the problems of how to clean up old hazardous waste dump sites that now threaten our environment); *id.* at 4 (statement of Senator Stafford) (bill excludes releases from other than "orphaned sites or into water"); *id.* at 8 (statement of Mr. Jorling) ("The bill addresses releases to the environment of . . . hazardous substances, and hazardous wastes from spills from inactive and abandoned waste sites").

v. Morristown, 276 U.S. 182, 192 (1928). *Accord, United States v. 67.59 Acres of Land*, 415 F. Supp. 544, 547 (M.D. Pa. 1976) (eminent domain powers must be strictly construed); *United States v. 20.53 Acres of Land*, 263 F. Supp. 694, 696-97 (D. Kan. 1967) (eminent domain power is dormant "until enactment of legislation expressly authorizing its exercise"). *See also* Nichols on Eminent Domain 3d ed. § 3.2 (1983) (same). When Congress wishes to provide an agency with the authority Petitioners seek here, it does so through clear, express language.[14] The absence of such language shows that Congress did not intend CERCLA to supply EPA with authority to take over private property.[15]

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[14] *See e.g.*, 33 U.S.C. § 591 (1982) (granting authority to Secretary of Army to "cause proceedings to be instituted . . . for the acquirement by condemnation of any land . . ." needed to maintain navigation of waters); 16 U.S.C. § 423k (1982) (authorizing Secretary of Interior to acquire property within certain boundaries); 10 U.S.C. § 2663 (1982) (authorizing military personnel to acquire property for certain purposes); 10 U.S.C. § 2664 (authorizing various agencies to condemn property needed for specified purposes).

[15] In its consideration of various bills, Congress had before it a proposal to authorize EPA to take over private property. In an appearance before the Senate Subcommittee on Environmental Pollution and Resource Protection, an official from the Iowa Department of Environmental Quality requested that Congress include in the Superfund legislation provisions to permit EPA to condemn property:

> I have three other general recommendations in regard to the law. I would like to see that EPA is authorized to take control of the dumpsite. Now that may in some cases mean actually having the authority to condemn property. Somehow or other on these sites, particularly if no responsible official can be found, someone is going to have to step in and take those over. It may be preferable that the local government or the State government do it. But in those cases where they do not have the capability, I think that EPA should be empowered to do that.

(Footnote continued on following page)

In the National Contingency Plan, 40 C.F.R. Pt. 300, EPA has spelled out comprehensive "procedures . . . to be employed in identifying, removing or remedying releases of hazardous substances." 42 U.S.C. § 9605. Nowhere in that regulation has EPA established procedures for obtaining access to private property through warrants, through "orders in aid of access" or through any other means. In 1985, after the lower court's decision was issued in this case, EPA amended the National Contingency Plan and continued to omit any access procedures. 50 Fed. Reg. 47,912, 47,950 (Nov. 20, 1985). The obvious conclusion is that the agency does not as a practical matter believe that the statute provides it with access authority.

The ruling of the Seventh Circuit accurately interpreted the Superfund statute as it presently exists. It is up to Congress to vest the EPA with additional authority if it so chooses.

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[15] *continued*
Hazardous and Toxic Waste Disposal Field Hearing: Joint Hearings Before the Subcomms. on Environmental Pollution and Resource Protection of the Senate Comm. on Environmental and Public Works, 96th Cong., 1st Sess. 25 (1979) (Remarks of Mr. Crane). Despite its awareness of the possibility of conferring power on EPA to take over private property, Congress chose to ignore Mr. Crane's recommendation.

CONCLUSION

For all the foregoing reasons, Respondent Outboard Marine Corporation respectfully requests that the Court deny the petition for a writ of certiorari.

Respectfully submitted,

RICHARD J. PHELAN
(Counsel of Record)

Of Counsel:

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& SONNENSCHEIN
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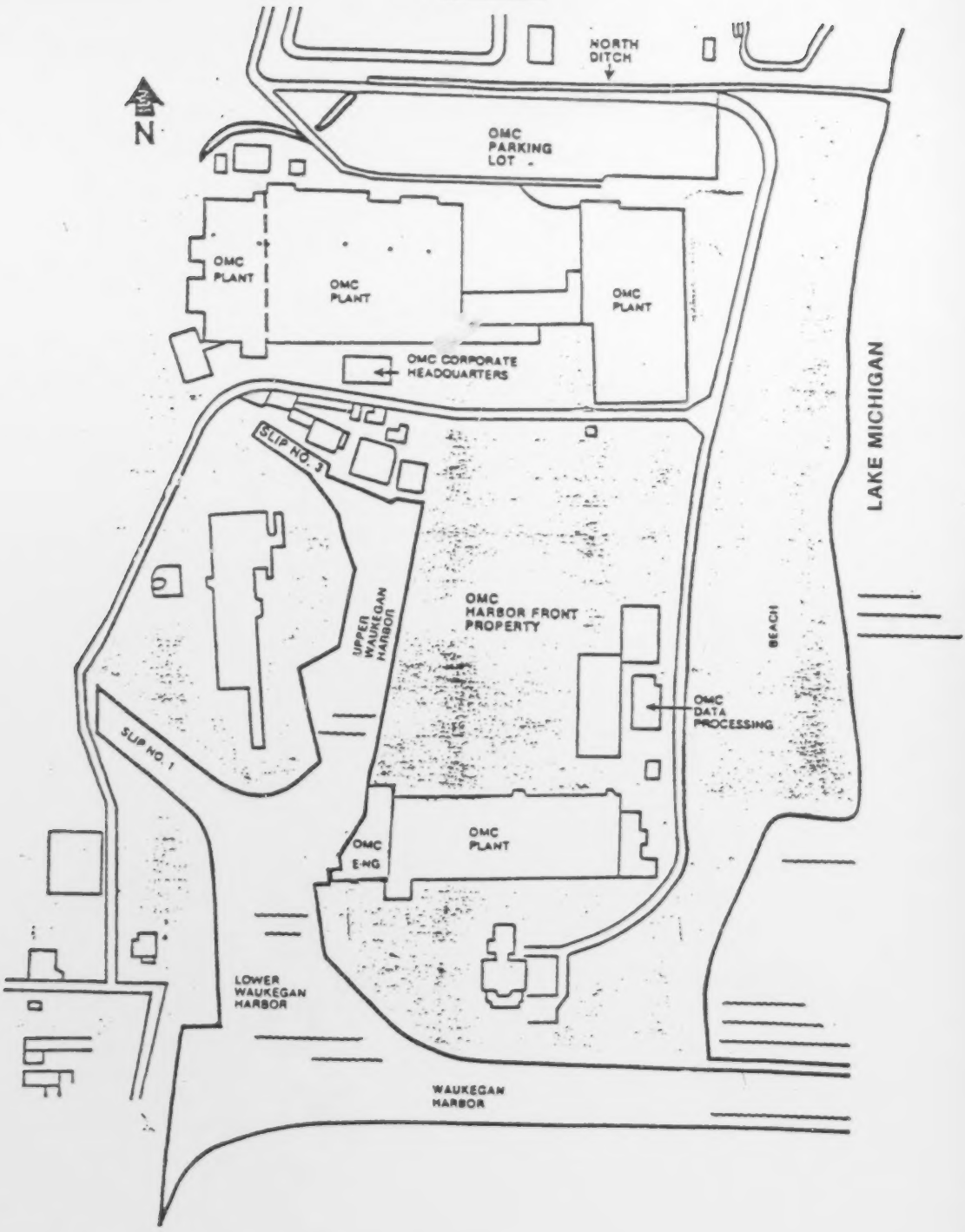
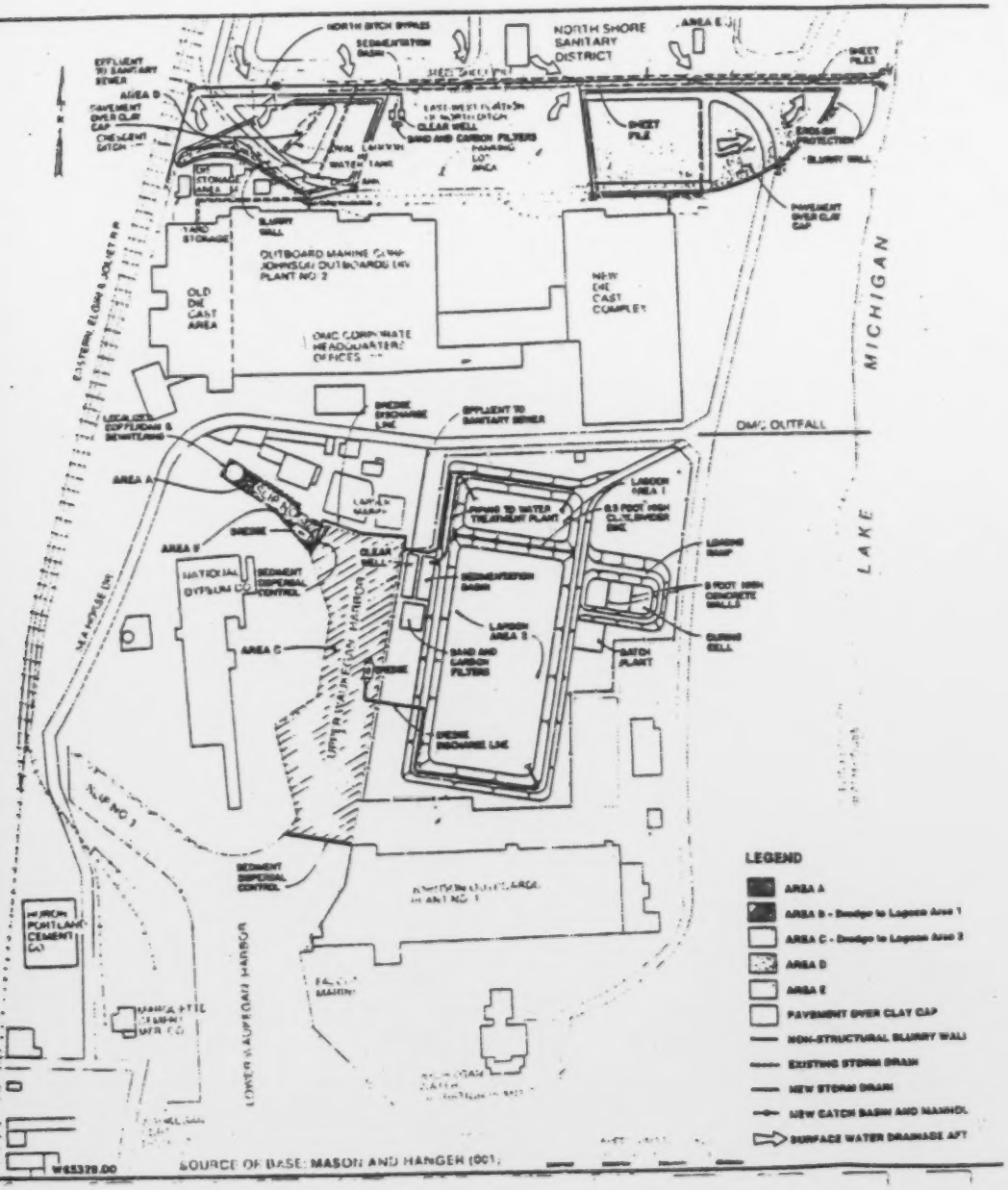
APPENDIX

APPENDIX A


NORTH DITCH
N
OMC PARKING LOT
OMC PLANT
OMC PLANT
OMC PLANT
OMC CORPORATE HEADQUARTERS
SLIP NO. 3
LAKE MICHIGAN
UPPER WAUKEGAN HARBOR
OMC HARBOR FRONT PROPERTY
BEACH
OMC DATA PROCESSING
SLIP NO. 1
OMC ENG
OMC PLANT
LOWER WAUKEGAN HARBOR
WAUKEGAN HARBOR

APPENDIX B


NORTH SHORE SANITARY DISTRICT
AREA E
SHEET PILE
AREA D
SLURRY WALL
OUTBOARD MARINE CORP. JOHNSON OUTBOARDS DIV. PLANT NO. 2
OMC CORPORATE HEADQUARTERS OFFICES
OLD DIE CAST AREA
NEW DIE CAST COMPLEX
PAVEMENT OVER CLAY CAP
EFFLUENT TO SANITARY SEWER
OMC OUTFALL
LAKE MICHIGAN
AREA A
AREA B
AREA C
NATIONAL GYPSUM CO.
SEDIMENT DISPOSAL CONTROL
CLEAR WELL
SEDIMENTATION BASIN
SAND AND CARBON FILTERS
BATCH PLANT
LOADING RAMP
CURING CELL
LOWER AUGLAIZE HARBOR
MAUMEE BAY
HURON PORTLAND CEMENT CO.
LEGEND
AREA A
AREA B - Dredge to Lagoon Area 1
AREA C - Dredge to Lagoon Area 2
AREA D
AREA E
PAVEMENT OVER CLAY CAP
NON-STRUCTURAL SLURRY WALL
EXISTING STORM DRAIN
NEW STORM DRAIN
NEW CATCH BASIN AND MANHOLE
SURFACE WATER DRAINAGE ART
W65378.00
SOURCE OF BASE: MASON AND HANGER (001)

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

OUTBOARD MARINE CORPORATION,

Defendant, Third-Party Plaintiff, and Cross-Claim Defendant,

and

MONSANTO COMPANY,

Defendant, Third-Party Defendant, and Cross-Claim Plaintiff.

No. 78 C 1004—Judge Susan Getzendanner

PLAINTIFF'S RESPONSE TO DEFENDANT MONSANTO COMPANY'S FIRST AMENDMENT TO ITS SECOND SET REQUESTS FOR ADMISSION TO PLAINTIFF UNITED STATES

In accordance with Rule 36 of the Federal Rules of Civil Procedure, plaintiff United States of America response [sic] to defendant Monsanto Company requests to admit as follows:

REQUEST TO ADMIT

1. Region V of the United States Environmental Protection Agency ("USEPA Region V") is headquartered in Chicago, Illinois and covers the States bordering on Lake Michigan.
RESPONSE: Plaintiff admits Request No. 1.

2. At this time USEPA Region V knows of no person who has suffered any immological [sic] disorder caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 2.

3. At this time USEPA Region V knows of no person who has suffered any cancer caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 3.

4. At this time USEPA Region V knows of no human birth defects caused by PCB in any infant born to any person who has consumed fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 4.

5. At this time USEPA Region V knows of no person who has suffered any sickness caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 5.

6. At this time USEPA Region V knows of no person who has suffered any chloracne, dermatitis or skin disorder caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 6.

7. At this time USEPA Region V knows of no person who has suffered any neurological disorder caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 7.

8. At this time USEPA Region V knows of no person who has suffered any fatigue caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 8.

9. At this time USEPA Region V knows of no person who has suffered any reduction or impairment in his vital lung capacity caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 9.

10. At this time USEPA Region V knows of no person who has suffered any hypertension caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 10.

11. At this time USEPA Region V knows of no instance of mutagenicity in any human being caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 11.

12. At this time USEPA Region V knows of no instance of fetotoxicity in any human being caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 12.

13. At this time USEPA Region V knows of no instance of teratogenicity in any human being caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 13.

14. At this time USEPA Region V knows of no instance of abnormal blood pressure in any person caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 14.

15. At this time USEPA Region V knows of no person who has suffered any heart disease or blood disease caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 15.

16. At this time USEPA Region V knows of no person who has suffered any reduced or abnormal physical growth caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 16.

17. At this time USEPA Region V knows of no person who has suffered any mental or behavioral disorder caused by PCB exposure through the consumption of fish or drinking water from Waukegan Harbor or Lake Michigan.
RESPONSE: Plaintiff admits Request No. 17.

* * * * *

31. The air in and near Waukegan Harbor, the North Ditch, and the property of Outboard Marine Corporation poses no significant human health problem attributable to the PCBs there.
RESPONSE: Plaintiff admits Request No. 31.

32. The drinking water in Waukegan, Illinois poses no significant human health problem attributable to PCBs in Waukegan Harbor, in the North Ditch, or on the property of OMC.

RESPONSE: Plaintiff admits Request No. 32.

Respectfully submitted,

DAN K. WEBB
United States Attorney

BY: /s/ JAMES P. WHITE
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 353-8788

JPW:ejd
09/15/82

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

THE CITY OF BLOOMINGTON, INDIANA, THE UTILITIES SERVICE BOARD OF BLOOMINGTON, INDIANA and MONROE COUNTY, INDIANA,
Plaintiffs,

v.

WESTINGHOUSE ELECTRIC CORPORATION and MONSANTO COMPANY,
Defendants.

and

UNITED STATES OF AMERICA,
Plaintiff,

and

THE STATE OF INDIANA and THE ENVIRONMENTAL MANAGEMENT BOARD OF THE STATE OF INDIANA,
Intervening Plaintiffs,

v.

WESTINGHOUSE ELECTRIC CORPORATION,
Defendant and Third Party Plaintiff,

v.

MONSANTO COMPANY,
Third Party Defendant.

Consolidated Cases — IP 83-9-C — Judge S. Hugh Dillin

ORDER FOR ACCESS TO CONARDS' PROPERTY

The Court having considered the Motion of the United States for Access to the Property of Dale and Connie Conard, the other pleadings of the parties on this issue, and the response thereto, it is hereby,

ORDERED:

1. Westinghouse Electric Corporation, its employees, agents and contractors, shall be permitted full and complete access to the real estate owned by Dale and Connie Conard, as specifically described in Exhibit "A" attached hereto ("said real estate"), as may be necessary to perform, complete, and maintain such remedial, sampling, and maintenance measures as are required under the Consent Decree to be performed at Conard's Branch and Richland Creek. Employees, agents, contractors, and duly authorized representatives of the United States, the State of Indiana, the City of Bloomington, and Monroe County shall also be permitted full and complete access to said real estate for the purposes of inspecting, monitoring, sampling and observing the performance, completion, and maintenance of such measures by Westinghouse Electric Corporation, for the other purposes in the Consent Decree and as necessary to fulfill their responsibilities under the Consent Decree.

2. Dale and Connie Conard shall take all steps necessary to permit and allow performance of the measures specified in the Consent Decree on their property, including, but not limited to cooperating in signing, if necessary, any necessary applications for governmental authorizations or permits, and providing access to the parties to the Consent Decree for the purposes specified in the Consent Decree, including the installation and maintenance of signs and fences, the excavation and removal of solid and hazardous substances, wastes and soils, the regrading, refilling

and capping of excavated areas, the installation, maintenance, and sampling of groundwater monitoring wells, the removal of stream sediments, and general site monitoring.

3. Dale and Connie Conard shall not interfere in any way with the performance, completion, and maintenance of said remedial, monitoring, and maintenance measures as are required by the Consent Decree on said real estate, nor alter, remove, or otherwise disturb the same.

4. This Order shall be binding upon Dale and Connie Conard, and upon their heirs, successors and assigns, and upon said real estate, and shall be filed in the office of the Recorder of Monroe County, Indiana and with the Clerk of the Monroe Circuit Court, Monroe County, Indiana.

/s/ S. HUGH DILLIN
UNITED STATES DISTRICT JUDGE

Date: 5/2/86

[Exhibit A omitted in printing.]

Supreme Court, U.S.
FILED
SEP 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1735 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1986

LEE M. THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONERS

v.

OUTBOARD MARINE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

FRANCIS S. BLAKE
General Counsel
Environmental Protection Agency
Washington, D.C. 20460

10 pp

TABLE OF AUTHORITIES

Cases:	Page
United States v. *Commonwealth Edison Co.*, 620 F. Supp. 1404	3
United States v. *Outboard Marine Corp.*, 789 F.2d 497	3, 4
Statutes and regulations:	
Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. (& Supp. II) 9601 *et seq.*:	
§ 101(9)(B), 42 U.S.C. 9601(9)(B)	6
§ 101(14), 42 U.S.C. 9601(14)	2
§ 102, 42 U.S.C. 9602	2
§ 104, 42 U.S.C. 9604	1, 3, 4, 5, 7
§ 104(a)(1), 42 U.S.C. 9604(a)(1)	2
§ 104(a)(1)(A), 42 U.S.C. 9604(a)(1)(A)	2
§ 104(a)(1)(B), 42 U.S.C. 9604(a)(1)(B)	6
§ 106, 42 U.S.C. 9606	4
Federal Water Pollution Control Act, 33 U.S.C. (& Supp. II) 1151 *et seq.*:	
§ 307(a), 33 U.S.C. 1317(a)	2
§ 311(b)(2)(A), 33 U.S.C. 1321(b)(2)(A)	2
Solid Waste Disposal Act, as added by the Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (42 U.S.C. (& Supp. II) 6901 *et seq.*)	4
Tucker Act:	
28 U.S.C. 1346	7
28 U.S.C. 1491	7
40 C.F.R. 116.4	2
40 C.F.R. 302.4	2
40 C.F.R. 401.15	2
Miscellaneous:	
48 Fed. Reg. (1983):	
p. 37342	3
p. 37344	3

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1735

LEE M. THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONERS

v.

OUTBOARD MARINE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

The question presented for review is whether Section 104 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9604, which authorizes the Environmental Protection Agency to take response actions to clean up releases of hazardous substances, authorizes access to private property to design and implement the remedial action. Respondent Outboard Marine Corporation opposes review of this question on the basis that CERCLA does not authorize such access absent a showing of imminent and substantial endangerment, and on the basis of several peripheral issues.

1. Respondent contends (Br. in Opp. 7-9) that no public purpose would be served by permitting EPA access to its property because there is no imminent and substantial danger to the public health or welfare. As we explain in our petition (at 10-12), however, Section 104 was enacted precisely to provide an alternative to the relief available, upon a showing of imminent and substantial endangerment, through Section 106. Since EPA sought access to respondent's property under Section 104(a)(1)(A),[1] there was no need to establish the existence of any imminent and substantial endangerment.[2]

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[1] We note that while respondent states (Br. in Opp. 5) that EPA acted "without warning to OMC," EPA repeatedly attempted to obtain voluntary access for design work, and sought a warrant only after the negotiations failed (Pet. App. 3a-5a).

[2] Section 104(a)(1) of CERCLA authorizes EPA to act whenever "(A) any hazardous substance is released or there is a substantial threat of such a release into the environment, *or* (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare" (emphasis supplied). Respondent does not dispute that there has been a release of PCBs, which are hazardous substances under CERCLA. Section 101(14) of CERCLA, 42 U.S.C. 9601(14), defines hazardous substances to include substances regulated under several other statutes and includes toxic pollutants listed and substances designated under Sections 307(a) and 311(b)(2)(A) of the Federal Water Pollution Control Act, 33 U.S.C. 1317(a) and 1321(b)(2)(A). PCBs are listed as toxic pollutants under Section 307(a), 40 C.F.R. 401.15, and designated as hazardous substances under Section 311, 40 C.F.R. 116.4. PCB also has been designated as a hazardous substance under Section 102 of CERCLA, 42 U.S.C. 9602. See 40 C.F.R. 302.4.

Respondent also incorrectly asserts that we have conceded that the PCB contamination produced by respondent[3] has "no identifiable adverse effects whatsoever" (Br. in Opp. 9), relying on responses to requests for admissions filed in September 1982. Those responses stated only that at that time no individual had been identified who had been harmed by respondent's release of PCBs, and that the air in the area and the drinking water of Waukegan, Illinois were safe (Br. in Opp. App. C). As the court of appeals recognized in affirming the government's voluntary dismissal of its Section 106 action, the government "did not admit that the PCB then present would not cause a significant health problem to humans in the future, or that the PCB did not present a present risk to the ecological life of the harbor or Lake Michigan, or that the PCB will not harm the fish and aquatic life in the area." *United States* v. *Outboard Marine Corp.*, 789 F.2d 497, 505 (7th Cir. 1986). Indeed, there is abundant evidence that PCBs have a variety of toxic effects on humans and other organisms, and are extremely persistent in the environment. See 47 Fed. Reg. 37342, 37344 (1982); *United States* v. *Commonwealth Edison Co.*, 620 F. Supp. 1404, 1406 (N.D. Ill. 1985) (summarizing effects). It is accordingly not surprising that PCBs are defined as hazardous substances under CERCLA (see note 2, *supra*).

Respondent suggests that EPA has no need for access under Section 104 because it may proceed un-

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[3] Although respondent attempts (Br. in Opp. 8) to suggest that it is merely a disinterested observer of the PCB contamination of Waukegan Harbor, respondent does not dispute that its operations were the source of the PCBs now dispersed on its property and in the Harbor. See, *e.g.*, Br. in Opp. 3-4.

der Section 106, 42 U.S.C. 9606, on a showing of imminent and substantial endangerment (Br. in Opp. 10-11). Congress, however, established two separate approaches for addressing hazardous waste contamination, with differing methods and standards for taking action.[4] Section 106 authorizes EPA to compel private parties to conduct their own cleanup, where there is an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance.[5] Section 104, in contrast, authorizes EPA to undertake cleanups whenever there is a release or substantial threat of release of a hazardous substance. The availability of relief under Section 106 in appropriate cases does not negate EPA's right to act, and to obtain access, under Section 104 in other situations.

The court of appeals' interpretation of Section 104 leaves EPA in virtually the same disadvantageous position it was in before Congress enacted Section 104. Under earlier statutes,[6] EPA had the authority to regulate hazardous waste disposal sites and to

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[4] The court of appeals recognized the distinctions between Sections 104 and 106 in its subsequent affirmance of EPA's decision to dismiss its injunctive action against OMC, including a Section 106 count, and to conduct its own PCB cleanup under Section 104. *United States* v. *Outboard Marine Corp.*, *supra*.

[5] Respondent errs in asserting (Br. in Opp. 10) that "EPA's claims that Section 106 provides it with no authority to obtain access to remedial sites." EPA has not and does not so claim (see Pet. 11).

[6] *E.g.*, Solid Waste Disposal Act, as added by the Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (42 U.S.C. (& Supp. II) 6901 *et seq.*).

bring suit to force cleanup by responsible parties, but it lacked the clear legal authority to respond to hazardous substance threats without establishing liability and obtaining an injunction to force cleanup by the responsible party. Section 104 of CERCLA was designed to remedy this situation by providing EPA with both the authority and the funding mechanisms necessary to undertake hazardous substance cleanups on its own, without requiring a showing of imminent and substantial endangerment. By limiting EPA's access authority to that available under the imminent and substantial endangerment standard of Section 106, the court of appeals would turn back the clock. As was the case before CERCLA's enactment, the court of appeals' holding would take away EPA's ability to respond to the release or threat of a release of a hazardous substances before the need for action becomes acute, and again allow EPA's response to be delayed by complex and lengthy legal proceedings.[7] As explained in our petition (at 8-14), prompt access is critical to EPA's ability to protect the public and the environment through remedial action under Section 104 and is implicit in the broad authority granted by that Section. It is inconceivable that Congress would have created direct response authority and established a $1.6 billion Trust Fund primarily to support such responses without intending that EPA could enter private property—with or without the consent of the landowner—to undertake remedial actions necessary to protect public health and the environment.

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[7] OMC's vague reference (Br. in Opp. 10-11) to "state powers over private property * * * available to the EPA" similarly ignores Section 104's clear mandate. Congress authorized EPA to act on its own authority under CERCLA, not to have to rely on whatever state powers may be available.

2. In urging that its Waukegan Harbor facility is not a "typical contaminated Superfund site" (Br. in Opp. 8), respondent attempts to deflect the Court's attention from the facts that the property *is* contaminated and that respondent is the source of the contamination in Waukegan Harbor. See, *e.g.*, *id.* at 4. Respondent is not, as it seems to suggest, simply some unaffected bystander whose property is to be enlisted in efforts to clean up a situation for which it bears no responsibility. In this context, respondent's efforts to subdivide its property into contaminated and uncontaminated portions is singularly unpersuasive; nothing in CERCLA suggests that EPA's authority to respond to a release is limited to the contaminated portions of the responsible party's property. As the district court recognized, "it cannot be argued that the EPA is limited in its planning investigation only to those areas contaminated by PCBs. Since the response authority includes the construction of on-site structures, the search of appropriate areas contiguous to contaminated areas, especially where the contaminated areas are bodies of water, for purposes of such construction is proper" (Pet. App. 33a-34a). The court of appeals did not disagree (Pet. App. 9a).

Respondent's related suggestion that CERCLA "was passed *primarily* as a response to abandoned and inactive waste sites, which were not covered under prior law" (Br. in Opp. 12 (emphasis added)), even if correct, does not establish that it applies *only* to such sites, and the statutory language is flatly inconsistent with such a limitation. Section 104(a)(1)(B) refers to the "owner or operator of the vessel or facility from which the release emanates," and Section 101(9)(B), 42 U.S.C. 9601(9)(B), defines "facility" to include "*any* site or area where a hazardous substance has been deposited, stored, disposed of, or

placed, or otherwise come to be located; but [it] does not include any consumer product in consumer use or any vessel" (emphasis added). In light of this broad definition with its very narrow exceptions, Congress could not have intended to limit the scope of the Act to abandoned or inactive sites.

3. Finally, respondent asserts that EPA's exercise of its response authority under Section 104 to implement a remedy on respondent's property constitutes an unauthorized taking of that property.[8] As explained in our petition (Pet. 14 n. 20) and above, EPA's entry and remedial work on respondent's property are actions authorized under Section 104 and any taking claim alleged to arise from EPA's exercise of its Section 104 authority must be brought pursuant to the Tucker Act, 28 U.S.C. 1346, 1491.

For the reasons stated above and in the petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.[9]

CHARLES FRIED
Solicitor General

FRANCIS S. BLAKE
General Counsel
Environmental Protection Agency

SEPTEMBER 1986

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[8] Contrary to respondent's implications (Br. in Opp. 5-6), the proposed cleanup actions are narrowly tailored to correct the situation created by respondent's failure to control the hazardous substances it uses, and nothing in this record suggests otherwise.

[9] There have not as yet been significant developments in Congress, beyond those described in our petition (at 16-17 & n.22). We will promptly inform the Court of future legislative action affecting this case.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 20309

Supreme Court, U.S.
FILED
NOV 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1735

In the Supreme Court of the United States

OCTOBER TERM, 1986

LEE M. THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
PETITIONERS

v.

OUTBOARD MARINE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO VACATE

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

DeFunis v. *Odegaard*, 416 U.S. 312 4
Diffenderfer v. *Central Baptist Church of Miami, Florida, Inc.*, 404 U.S. 412 4-5
Great Western Sugar Co. v. *Nelson*, 442 U.S. 92 5
North Carolina v. *Rice*, 404 U.S. 244 4
United States v. *Munsingwear, Inc.*, 340 U.S. 36 5
United States Department of Justice v. *Provenzano*, 469 U.S. 14 4
United States Nuclear Regulatory Commission v. *Sholly*, 459 U.S. 1194 4

Statutes:

Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601 (& Supp. II) *et seq.*:
§ 104, 42 U.S.C. 9604 ..... 3, 4
§ 104(a), 42 U.S.C. 9604(a) 2
§ 104(b), 42 U.S.C. 9604(b) 2
§ 104(e), 42 U.S.C. 9604(e) 1, 3

Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 (Oct. 17, 1986):
§ 4 3
§ 104(m) 1, 3, 5

Miscellaneous:

131 Cong. Rec. (daily ed. Sept. 26, 1985):
p. S12184 3
P. S12189 3
H.R. 2005, 99th Cong., 1st Sess. (1985) 3
S. Rep. 99-11, 99th Cong., 1st Sess. (1985) 3

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1735

LEE M. THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONERS

v.

OUTBOARD MARINE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO VACATE

The Solicitor General, on behalf of the Administrator of the Environmental Protection Agency and the Environmental Protection Agency (EPA), respectfully moves that the judgment of the court of appeals be vacated and the case remanded for further consideration in light of the amendment of Section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9604(e), by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 104(m) (Oct. 17, 1986).

1. The question presented by the petition for a writ of certiorari, granted by the Court on October 6, 1986, is (Pet. I):

> Whether Section 104 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9604, which authorizes the Environmental Protection Agency to take removal and remedial action when there is a release or

> substantial threat of release of a hazardous substance, provides the right to enter private property to design and implement the appropriate removal or remedy.

At the time of the court of appeals' decision and this Court's order granting the petition for a writ of certiorari, Section 104(a) of CERCLA, 42 U.S.C. 9604(a), gave EPA broad authority, whenever there is a release or substantial threat of release of a hazardous substance, "to act * * * to remove * * * and provide for remedial action relating to such hazardous substance * * * or take any other response measure" deemed necessary (Pet. App. 39a-40a). Section 104(b), 42 U.S.C. 9604(b), authorized EPA to "undertake such planning * * * engineering * * * and other studies or investigations as [it] may deem necessary or appropriate to plan and direct response actions" (Pet. App. 40a-41a).

On the basis of this authority, EPA obtained a magistrate's warrant authorizing entry to respondent's property at Waukegan, Illinois, to obtain information necessary to complete design plans and specifications to remedy polychlorinated biphenyl (PCB) contamination on that property and in portions of Waukegan Harbor adjacent to that property (see Pet. 4-5). The magistrate, and subsequently the district court, held that Section 104 of CERCLA implicitly authorized EPA to enter the site for the requested design actions (see Pet. 4-6). On September 23, 1985, the court of appeals reversed and remanded, holding that EPA had no implicit authority under Section 104 to enter private property to design and implement a hazardous waste remedy. The court stated (Pet. App. 14a):

> Perhaps congressional failing to provide for the circumstance which we face was a mere oversight, but this court is not a committee to consider statutory amendments.

Similarly, in opposing the petition for a writ of certiorari, respondent argued that it "is up to Congress to vest the

EPA with additional authority if it so chooses" (Br. in Opp. 15).

2. In its petition, the United States advised the Court that Congress was considering amendments to CERCLA which, among other things, would expressly reaffirm EPA's broad access authority under Section 104, and which would supersede the court of appeals' decision in this case, making plenary review by this Court unnecessary (Pet. 16-17 & n.22). The President on October 17, 1986, signed the Superfund Amendments and Reauthorization Act of 1986, which explicitly authorizes the necessary access.[1] Pub. L. No. 99-499 (Oct. 17, 1986).[2] The Act amends Section 104(e), adding a new Section 104(e)(1) and (3) (Pub. L. No. 99-499, § 104(m)):[3]

> (e) Information gathering and access.—
>
> (1) Action authorized.—Any officer, employee, or representative of the President, duly designated by the President, is authorized to take action under paragraph (2), (3), or (4) * * * at a vessel, facility, establishment, place, property, or location or, in the case of paragraph (3) or (4), at any vessel, facility, establishment, place, property, or location which is adjacent to the vessel, facility, establishment, place, property, or location referred to in such paragraph (3) or (4). * * *
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> * * * * *

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[1] With limited exceptions not relevant here, the Act became effective on the date of enactment. See Pub. L. No. 99-499, § 4.

[2] We are lodging a copy of that Act with the Clerk of this Court.

[3] The report accompanying the Senate bill (S. Rep. 99-11, 99th Cong., 1st Sess. (1985)), which contained similar access authority (H.R. 2005, 99th Cong., 1st Sess. § 120(1)(B) (1985); 131 Cong. Rec. S12184, S12189 (daily ed. Sept. 26, 1985)), stated that: "The amendment confirms the broad access authority the that Congress originally intended when CERCLA was enacted in 1980." (S. Rep. 99-11, *supra*, at 26).

> (3) Entry.—Any officer, employee, or representative described in paragraph (1) is authorized to enter at reasonable times any of the following:
>
> * * * * *
>
> (D) Any vessel, facility, establishment, or other place or property where entry is needed to determine the need for response or the appropriate response or to effectuate a response action under this title.

These amendments render moot the single issue with respect to which certiorari was granted in this case, that is, the scope of EPA's entry authority under the prior, but now-superseded, Section 104. *United States Department of Justice* v. *Provenzano,* 469 U.S. 14, 15 (1984). The question of access authority under Section 104 of CERCLA must now be judged under the law presently in effect. 469 U.S. at 15 (citing *DeFunis* v. *Odegaard,* 416 U.S. 312, 316 (1974); *North Carolina* v. *Rice,* 404 U.S. 244, 246 (1971)).

While the issue this Court has agreed to review is now moot, the case remains alive. EPA still seeks to enter the property for the requested design activities.[4] The extent of EPA's authority under the amended statute should be considered by the courts below. Thus, we submit that this Court should vacate the judgment of the court of appeals, and remand the case for further proceedings in light of the intervening change in the law. The Court has consistently followed this course in similar circumstances. See, *e.g.*, *United States Department of Justice* v. *Provenzano,* 469 U.S. at 15-16; *United States Nuclear Regulatory Commission* v. *Sholly,* 459 U.S. 1194 (1983); *Diffenderfer* v. *Central Baptist Church of Miami, Florida, Inc.*, 404 U.S. 412,

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[4] Furthermore, the court of appeals, in deciding the access issue, did not reach other issues before it (compare Pet. App. 10a-15a with 23a-35a).

415 (1972). Cf. *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92, 93 (1979); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950).[5]

It is therefore respectfully submitted that the judgment of the court of appeals should be vacated and the case remanded for further consideration in light of Section 104(m) of Pub. L. No. 99-499.[6]

CHARLES FRIED
Solicitor General

NOVEMBER 1986

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[5] This practice is, of course, similar to the Court's very frequent practice of vacating judgments and remanding cases for reconsideration in light of intervening decisions of this Court.

[6] There are presently pending before this Court respondent's petition for a writ of certiorari (No. 86-280) seeking review of an unrelated issue in this litigation, and its motion to consolidate the two matters. The recent amendments to CERCLA do not impair the reasons given in our brief opposing certiorari in No. 86-280. Because those amendments do, however, render unnecessary the plenary consideration of the issue raised in our petition, the motion to consolidate is without foundation.

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Respondent.

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RESPONDENT OUTBOARD MARINE CORPORATION'S RESPONSE TO THE MOTION TO VACATE

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6 pp

TABLE OF AUTHORITIES

	PAGE
United States v. Munsingwear, 340 U.S. 36 (1950) .	2, 3
Comprehensive Environmental Response, Compensation and Liability Act of 1980, § 104, 42 U.S.C. § 9604	1
Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 104(m) (Oct. 17, 1986)	1, 2

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On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT OUTBOARD MARINE CORPORATION'S RESPONSE TO THE MOTION TO VACATE

Petitioners have filed a motion to vacate as moot the decision of the United States Court of Appeals for the Seventh Circuit, because the provisions of the statute which the lower court interpreted, § 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9604 ("Superfund"), has been amended by § 104(m) of the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499 (Oct. 17, 1986) ("Superfund Amendments"). Respondent Outboard Marine Corporation ("OMC") submits this response to that motion, as requested by the Court.

This matter arose after the United States obtained an ex parte warrant to begin a three and one-half year construction project on OMC's property. The warrant expressly incorporated and cited various provisions from § 104 of the original Superfund Act. OMC filed this action to enjoin the enforcement of the warrant, and it subsequently filed a motion for preliminary injunction. The district court denied the motion (Pet. App. 16a), and the Seventh Circuit reversed, holding that there was no statutory authority for the government's warrant (Pet. App. 13a-14a). The new Superfund Amendments contain different access provisions (§ 104(m)) from those in the original statute, and petitioners have represented to the Court that they will only proceed under the new legislation.

Under those circumstances, petitioners concede that the issue before this Court is now moot, and they request the Court to vacate the Seventh Circuit's ruling. OMC agrees that the present appeal is moot, but it submits that the Court should simply dismiss the petitioners' appeal before this Court.

The Seventh Circuit decision held only that the original Superfund statute did not authorize the ex parte warrant issued to the government for access to OMC's property (Pet. App. 13a-14a). That warrant expressly relied on the original statute. Leaving that ruling undisturbed will not prevent the government from proceeding under the new Superfund Amendments. With or without that ruling, if the government proceeds under the new Superfund Amendments, the district court will still have to determine the continued status of this case, which is still pending on the merits. The Seventh Circuit's ruling will have no effect on the subsequent disposition of this matter in the district court.

In *United States v. Munsingwear*, 340 U.S. 36, 39-40 (1950), the Court held that vacating a lower court ruling

on a moot issue "clears the path for future relitigation of issues between the parties and eliminates a judgment, review of which was prevented through happenstance." The Court's concern in *Munsingwear* that the parties should be allowed to relitigate issues not reviewed is not relevant here, because the new statute presents different issues and different procedures. The Seventh Circuit's decision need not be vacated because of res judicata concerns.

Enactment of the Superfund Amendments obviates any lasting effect from the Seventh Circuit's interpretation of the original statute. For that reason, there is no justification in the facts and legal principles of this matter to vacate the Seventh Circuit's ruling. Because the issue is moot, the present appeal should be dismissed.

For the foregoing reasons, Respondent Outboard Marine Corporation respectfully requests that the Court deny the motion to vacate and dismiss the proceedings before this Court.

Respectfully submitted,

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